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No. _____

In The
Supreme Court of the United States

BELINDA DUPUY, et al.,

Petitioners,

v.

ERWIN McEWEN, Director,
Illinois Department of Children and Family Services,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the Illinois Department of Children and Family Services ("DCFS") receives allegations made to the State telephone Hotline of child abuse or neglect, DCFS investigators implement "safety plans" at the outset of the ensuring investigations. The safety plans routinely require parents or children to leave their family home and/or have no contact or only restricted contact with each other from the very beginning of investigations until their conclusion.

This case is a class action brought by parents and other family members ("parents") affected by safety plans. The parents challenge the State's policies and practices giving rise to such plans.

The question presented is:

When a State has only "mere suspicion" of child abuse or neglect, does it deprive the parents and their children of their rights under the Due Process Clause of the Fourteenth Amendment when it:

(a) secures safety plans either by direction or by telling parents that if they refuse to agree to a plan, the State may take custody of the children and place them in foster care; and

(b) provides no opportunity to contest the plans?

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs-appellants below, are named plaintiffs Belinda Dupuy, Pilar Berman, Norman Berman, Pearce Konold, Jeff Dupuy, V. A., G. A., T. A., R. F., A. H., and K. S., on their own behalves and on behalf of a certified class of persons defined as follows (Order, March 22, 1999, as amended by Order April 19, 2004):

(a) all persons (unless excluded as class members under the last paragraph of this definition) who have been, are being or will be named as perpetrators of child abuse or neglect in "indicated reports" (as defined in the Abused and Neglected Child Reporting Act, 325 ILCS 5/3) placed in the Illinois "State Central Register" (the "SCR," referenced in 325 ILCS 5/7.7) on or after June 17, 1995;

(b) all persons (unless excluded as class members under the last paragraph of this definition) who were named as perpetrators of child abuse or neglect in "indicated reports" (as defined in the Abused and Neglected Child Reporting Act, 325 ILCS 5/3) placed in the Illinois "State Central Register" (the "SCR," referenced in 325 ILCS 5/7.7) prior to June 17, 1995 if, on or after that date, the Illinois Department of Children and Family Services ("DCFS") discloses or will disclose such reports (or any information in such reports) to persons outside the SCR (including persons employed by DCFS or its assigns) other than the perpetrator, or such reports (or the information in such reports) are or will be accessed by such persons outside the SCR.

(c) the custodial parent or guardian of a class member as defined in ¶(a) or (b) herein, if the class member is under 18 years of age.

The persons referred to as being "excluded as class members" in subparagraphs (a) and (b) of the class definition are persons named as perpetrators in

indicated reports: whose reports have been removed from the SCR pursuant to 325 ILCS 5/7.14; or who have been parties to a criminal proceeding under the Illinois Criminal Code or a civil proceeding under the Illinois Juvenile Court Act, and in such a proceeding, a court, in a final non-appealable order, has determined that such acts or omissions upon which the indicated report is based constitute child abuse or neglect.

(d) any person (except an "excluded alleged perpetrator" under the language following this paragraph) who, on or after June 17, 1995, has been named, in a report to the DCFS Child Abuse and Neglect Hotline, as a possible perpetrator of child abuse or neglect or whom DCFS, in a child abuse or neglect investigation conducted (in whole or in part) on or after June 17, 1995, has investigated, is investigating or will investigate as a possible perpetrator of child abuse or neglect (any such "possible perpetrator" being referred to herein as an "alleged perpetrator") who during the pendency of any DCFS investigation of child abuse or neglect, or thereafter, has been, is or will be required by DCFS, under threat of protective custody, to adhere to and/or carry out one or more of the following conditions, put forth in any DCFS protective plan, safety protection plan, safety plan or directive:

> (1) a condition prohibiting or restricting, physical and/or verbal contact between any such person and his or her biological or adopted child, or, if the alleged perpetrator is a child, a condition prohibiting contact between the alleged perpetrator and his or her parents or legal guardians or any other adult relatives who live with the alleged perpetrator; or

> (2) a condition prohibiting any such person's spouse, child, parent or legal guardian from residing in the home with him or her.

A person who is an "excluded alleged perpetrator" under ¶(d) of this class definition is any alleged perpetrator who is also a person who has been or is a party to a criminal proceeding under the Illinois Criminal Code or a civil proceeding under the Illinois Juvenile Court Act, or a civil proceeding under the Illinois Marriage and Dissolution of Marriage Act, or any other civil proceeding adjudicating familial interests, and as the result of such a proceeding, there is in effect a court order that imposes on him or her conditions that are the same as the conditions in, or includes within it the conditions that are described in or referenced in ¶¶ (d)(1) or (d)(2).

As petitioners do not include a nongovernmental corporation, no corporate disclosure statement is required.

Respondent, defendant-appellee below, is the Director of the Illinois Department of Children and Family Services in his official capacity. The director is currently Erwin McEwen. His predecessor in office, who was a party to the proceedings below, was Bryan Samuels.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

CITATIONS OF OPINIONS AND ORDERS

The final decision and judgment of the Seventh Circuit as to which review is sought is reported at 495 F.3d 807 (7th Cir. 2007) and reprinted at App.1a-6a. An interlocutory decision and judgment of the Seventh Circuit, which would also be brought before this court for review if this petition is granted, is reported at 465 F.3d 757 (7th Cir. 2006) and reprinted at App.7a-19a. The cited Seventh Circuit 2007 decision and judgment affirmed district court orders, dated March 9, 2007 and February 26, 2007, that dismissed or noted the dismissal of plaintiffs' claims, which are unreported but are reprinted at App.20a and App.21a-23a. The cited 2006 decision and judgment of the Seventh Circuit nominally affirmed a district court injunction order in plaintiffs' favor, but ruled that plaintiffs were not entitled to any such relief. App.19a. That district court injunction order, which is unreported but reprinted at App.24a-28a, had implemented a district court memorandum opinion and order in plaintiffs' favor that is reported at 462 F.Supp.2d 859 (N.D. Ill. 2005) and reprinted at App.290a-101a. The order of the Seventh Circuit denying plaintiffs petition for rehearing, with a suggestion for rehearing en banc, of that court's cited 2007 decision and judgment is unreported but is reprinted at App.102a-103a.

JURISDICTION

The final decision and judgment of the Seventh Circuit as to which petitioners seek review was entered on July 31, 2007. App.1a-6a. An

interlocutory decision and judgment of the Seventh Circuit, which would also be brought before this court for review if this petition is granted (*Reece v. Georgia*, 350 U.S. 85, 87 (1955), *Urie v. Thompson*, 337 U.S. 163, 171-72 (1949)), was entered on October 3, 2006. App.7a-19a.

On October 15, 2007, the Seventh Circuit denied petitioners' petition for rehearing, with a suggestion for rehearing en banc of the court's cited 2007 decision and judgment. App.103-104a. On December 17, 2007, Justice Stevens entered an order extending the time within which to file a petition for certiorari in this matter to and including February 13, 2008.

This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, provides: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Plaintiffs' Complaint and the Proceedings Generally

In 1997, parents who had been reported for suspected child abuse or neglect filed this class action against the DCFS Director ("Director"). App.1a. Plaintiffs' complaint, which sought declaratory and injunctive relief, challenged a number of interrelated DCFS policies and practices, as violative of plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment. *Id.*; App.29a.

Plaintiffs' claims gave rise to two distinct proceedings.

In the first proceeding (*Dupuy I*), the district court found that DCFS used a "practically nominal" burden of proof in indicating accused persons as guilty of abuse in its investigations.[1] *Dupuy v. McDonald*, 141 F.Supp.2d 1090, 1140 (N.D. Ill. 2001), *subsequent injunction aff'd in part and rev'd in part*, 397 F.3d 493 (7th Cir. 2005). The district court also found a "staggering" 74.5% rate of error in the indicated reports DCFS investigators registered, as measured by the reversal rate for indicated finding appeals. 141 F.Supp.2d at 1136. The parties eventually settled *Dupuy I*.

The second proceeding (*Dupuy II*) concerned DCFS's safety plan policies and practices and gives rise to this petition.

B. The *Dupuy II* Proceeding

In 2002, the plaintiffs initiated a second class preliminary injunction proceeding; they challenged DCFS's imposition of safety plans upon families absent objectively reasonable suspicion of parental abuse or neglect and without affording them any process to challenge plans. App.30a, 74a, 83a. An estimated 10,000 Illinois families per year (since 1995) have had DCFS safety plans imposed upon them. App.40a. Virtually all safety plans require major changes respecting parents' custody, care and supervision of their children. App.41a. Commonly,

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[1] An "indicated" finding of abuse or neglect is a non-criminal administrative determination at the conclusion of child abuse or neglect investigation. *Dupuy I*, 141 F. Supp. 2d at 1093. When the accused parent is exonorated, the case is "unfounded." *Id.* Indicated findings are registered in the State Central Register (*id.*), and are used in licensing and employment screening decisions, among other things. *Id.* at 1139. Pursuant to the Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C. § 5106 (a) and (b)(2)(A)(i), states receive federal assistance to operate their child abuse and neglect reporting and determination systems.

safety plans require that fathers or mothers (or both) leave their homes, that children reside with relatives, or that relatives move into the family home and supervise all contact between parents and children. *Id.* Some safety plans provide for no contact between parents and children during the entire duration of the plans. *Id.*

Following a 22-day evidentiary hearing in *Dupuy II* in 2002 and 2003, the district court issued its findings of fact, describing in detail the challenged DCFS safety plan policies and practices, including their application to ten identified plaintiff families. App.29a-71a. DCFS has never challenged any of the district court's findings of fact.

1. The Development, Implementation and Terms of Safety Plans

In 1995, Illinois adopted a procedure, not embodied in any statute or formal regulation, for implementing safety plans in its investigations of Hotline calls. App.14a. The Hotline accepts telephone calls alleging a suspicion of child abuse or neglect from any person (including anonymous callers) and then assigns these calls for investigation. App.31a. Hotline call screeners do not investigate the merits of calls before assigning them to investigators in field offices. App.31-32a. Pursuant to a risk assessment procedure, known as the Child Engenderment Risk Assessment Protocol ("CERAP"), DCFS investigators, within 48 hours of DCFS's receipt of a Hotline call, are required to designate allegedly abused or neglected children as "safe" or "unsafe" by utilizing a series of check boxes on the CERAP form, App.34-38a, 45a. The 48-hour point when DCFS investigators are expected to complete the CERAP, marks the outset of the "initial investigation," *Dupuy I*, 141 F.Supp.2d at 1095. At this point, investigators are expected to have made a good faith attempt to see each alleged child victim,

but are not expected to have interviewed any witnesses. *Id.*

The CERAP check box form first requires investigators to determine if any "safety factor" is present. App.34-38a. To be checked "yes," no safety factor requires any particular "'level of evidence.'" App.36a. Several of the safety factors are to be checked "yes" whenever an "allegation" of a particular type has been made. App.36-37a. Nine of the 15 safety factors are to be checked "yes" if any household member's behavior raises a concern, even if that household member is not the parent. App.37a.

If a safety factor is checked "yes," then the CERAP instructs investigators to determine if any family strength or mitigating circumstance controls for that safety factor, though any particular strength or circumstance, even if present, may be deemed insufficient to control for a safety factor. App.38-39a. If investigators determine that any one safety factor is present but not controlled for, CERAP directs investigators to deem a child "unsafe." App.39a. Upon reaching this conclusion, to be made within 48 hours of DCFS's receipt of a Hotline call, App.39a, 45a, the CERAP policies direct investigators to implement safety plans to which the parent or parents "agree," or, if there is no agreement, to take the child from the parents and into State custody at that time, App. 39a, 40a, 43-44a. A parent must therefore decide whether to agree to or reject a safety plan "on the spot," at the outset of the investigation, *see* App. 39a, 40a, 54a, 56-57a, 58-59a, 62a, 64a, 65-66a, 68a, 60-70a, and rarely, if ever, do they have counsel or any adviser to assist them in making that decision, *id.*

DCFS subjected Professors M. and S., who both teach at a major Chicago-area university, to a safety plan after an anonymous Hotline call alleged Dr. S. had abused their eight-year old adoptive

daughter. App.67a. Under CERAP, DCFS determined that the anonymous allegation against Dr. S., without any evidence, provided sufficient basis to decide that his daughter was "unsafe". App.35a (*i.e.*, factor #10); App.36a ("no level of evidence" needed to check a factor "yes"). Indeed, shortly after receiving the Hotline call, DCFS dispatched an investigator to the S. home who demanded that Dr. S. vacate his home immediately. App.68a. The investigator communicated to Dr. S. that, if he did not leave himself, DCFS would take their daughter into foster care. *Id.* Dr. S. complied. *Id.* In the ensuing investigation, DCFS never secured credible evidence supporting the anonymous Hotline call. App.68a.

As typified by the Dr. S. case, DCFS investigators do not inform parents of the reasons for the safety plan demand, including the safety factors DCFS finds present or the reasons it has concluded that a child is "unsafe." App.44a. Nor does DCFS ever give the CERAP determination form to parents. *Id.*

DCFS often presents its safety plan only to the child's "primary caregiver" rather than to the person accused or abuse or neglect. App.42a. For example, an anonymous person reported seeing James Redlin, a high school science teacher, tickle his six-year old son on a train. App.53a. After a Hotline call, a DCFS investigator called Susan Redlin, James's wife, and demanded a safety plan that required Susan, who is wheelchair bound, to provide 24-hour supervision of all contact between her husband and her son. App.54a. Another DCFS investigator telephoned pre-school teacher Stacey DeLaFont after DCFS received a Hotline call concerning alleged abuse of a pre-school child by her husband Patrick, also a teacher in the same pre-school. App.58a. The investigator demanded that Mrs. DeLaFont evict her husband Patrick from their home, even though the DeLaFonts' own children were not the subjects of

any accusation. App.58-60a. DCFS did not confer with Patrick for more than a week after he left his home, and when an investigator did meet with him, she did not allow him to return home. App. 59a. As in the S. and Redlin cases, the allegations against Patrick DeLaFont eventually were "unfounded," though not until he had lived apart from his family for 11 months. App. 60-61a.

In creating safety plans, it is sometimes "'impossible ... for the Department to obtain . . . express agreement to the plan [by a parent or parents].'" App. 46a (ellipses in original). Also, DCFS sometimes presents safety plan conditions as oral directives as to which no written agreement is requested (as in the DeLaFont case, App.58a, 59a), and it treats "mere action in conformity with a DCFS request" as "agreement" to a safety plan. App.45a.

Because DCFS often presents safety plans to only one parent, in many cases, only one parent "sign[s] the safety plan form." App.42a. That form contains preprinted standard language stating that "failure to agree to the plan or to carry out the plan may result in a reassessment of my home and possible protective custody and/or referral to the State's Attorney's Office for a court order to remove my children from my home." App.43a. The form contains no information about the evidence required to take children into protective custody or the legal procedure for challenging such a removal. App.42-43a, 44a.

DCFS Supervisor Beckelman told Stacey DeLaFont that if her husband Patrick remained in the home, contrary to the safety plan, "Beckelman would remove the children from the home." App.59a. DCFS Investigator Abernathy told child care provider Christine Parikh that "'if [her husband] Jimmy did not move out of the house and cease all contact with the minor children living in his home,

the children would be taken into DCFS custody." App.62a.

"[V]irtually every parent or caretaker confronted with a safety plan [whom DCFS asks to sign such a plan] ends up signing it." App.43a. Although, since 1995, an estimated 10,000 families per year were subject to safety plans (App.40a), DCFS has never "identified a single family that... chose to reject the plan." App.93a. "Nearly every class member witness who signed a safety plan testified that the investigator simply presented a proposed plan for his/her signature with little or no discussion of the plan terms or alternatives." App.40a.

Most investigations (approximately two-thirds) end with a DCFS determination that the allegations are unfounded. App.31a. DCFS Child Protection Manager Anne Gold acknowledged at the trial that "'for the cases that end up getting unfounded in [her] office, the likelihood that [DCFS] would have grounds for . . . [taking] custody [of a child if the parent did not agree to a safety plan] . . . is about zero." App.45a.

Safety plans generally continue throughout an investigation. App.49a. DCFS has 60 days to complete investigations, but may extend the time and often does, App. 32a (*citing Dupuy I*, 141 F.Supp.2d at 1106-1130), so that safety plans remain in effect for many families for several months or more. Safety plans may continue in some cases after the investigation is over and even if the allegations are unfounded. App.49a. The safety plan for the DeLaFont family remained in effect for 11 months (App.58a, 61a), and the plan for the D. family remained in effect for 18 months, App.69-70a.

The district court concluded that class members whose lives are disrupted by safety plans which require family members to live outside the home or which restrict contact between family

members suffer "irreparable harm." App.99a. For example, while Susan Redlin was wheelchair bound, her family's safety plan required her to supervise all of her son's interactions with his father James; because of the great difficulty of transporting Susan outside the home, this plan effectively consigned the family members to being "'prisoners' in their own home" for the plan's three-month duration. App.53-55a. The DeLaFont family's plan required Patrick DeLaFont to leave his home and have no contact with his children (although there were no allegations regarding mistreatment of them); DCFS later relaxed this requirement to permit him to see his children at church on Sunday. App.58-59a. The D. family's safety plan first required 16-year-old E.D. to remain outside his own home. App.69a. Weeks later, however, DCFS modified the plan to permit E. D. to return home, provided that he have "no contact with younger children." App.70a. "In addition, [the plan required] Mrs. D. . . . to remain 'awake at night when the rest of the family is sleeping, in order to supervise [E. D.] at night.'" *Id.*

"DCFS has no procedure authorizing those subject to a safety plan to contest it in any way." App.49a.

2. The District Court's Conclusions and Its Injunction Order

The safety plan form tells parents that if they did not agree to a safety plan, DCFS "may" take custody of their children. App.92a. The district court found that although this "language may not by itself constitute a threat of actual removal" (*id.*), "most class member witnesses testified at the hearing that . . . the investigator affirmatively threatened to take away Plaintiffs' children unless they agreed to a safety plan," App.93a. After considering the safety plan form together with "investigator[s'] [statements] affirmatively threaten[ing] to take away Plaintiffs' children unless

they agreed to a safety plan," the district court found that DCFS made "threat[s] sufficient to deem the family's agreement [to safety plans] coerced." *Id.* In support of this finding of fact, the district court stated that "[s]ignificantly, [DCFS] has not identified a single family that, faced with such an express or implied threat of protective custody, chose to reject the plan." *Id.*

The district court held that plans remaining in effect for longer than a "brief" duration would violate due process. App.94a. Subsequently, the district court entered a preliminary injunction order that established an informal process for review of safety plans after ten working days, exclusive of weekends. App.27a.

The parents appealed on the ground that the relief order was inadequate. App.2a, 7a. DCFS did not cross-appeal. *Id.*

3. The Seventh Circuit's Interlocutory Decision

DCFS's principal defense on appeal was the same as it presented to the district court: parents voluntarily agreed to every plan that DCFS had ever implemented, or would ever implement. *See* App.27a (district court notes DCFS's "consistent position" that safety plans are "voluntary").

On October 3, 2006, the Seventh Circuit affirmed the district court's injunction order, but only because DCFS had not cross-appealed (App.19a); effectively, it reversed that order, *id.*

The Seventh Circuit acknowledged that safety plans involved the imposition of "restrictions," such as requiring the child or parent to leave the home, and that these restrictions involved "curtailments of parental rights" that were "invasive enough to count as deprivations of liberty, thus triggering the right to a hearing." App.13a. But it denied the State's

imposed restrictions effected constitutionally cognizable deprivations on the ground that all "safety plan[s are] voluntary." App. 15a. "Critically," the court said, "the decision to agree to the safety plan is optional with the parents" (App.13a), since "[t]he state does not force a safety plan on the parents; it merely offers it," App.14a. The Seventh Circuit concluded that DCFS need not afford plaintiffs any due process protections. *Id.* It held that the State could "offer" safety plans upon "mere suspicion" of abuse and neglect, which the court defined as "some inarticulable hunch," App.15a. It held as well that the plaintiffs were not entitled to a hearing to contest safety plans to which they had voluntarily agreed. App.14a.

The Seventh Circuit recognized that DCFS secures safety plans by telling parents that "in lieu of [DCFS] immediately removing the child," the parent has the "option" to "leave the house" or stay away from the child unless a "designated family member is present." App.13a. But it held that there is nothing "forbidden" or "objectionable" (App.15a) about a state official making a threat (*e.g.*, taking custody of children from their parents) to "coerce[e] an agreement" unless the coercion used to secure that agreement itself employs an "illegal means." App. 17a. The only example the Seventh Circuit offered of "illegal means" were threats that involved "*knowing*" misrepresentations, App.17a (emphasis in original); *accord*, App. 19a.

The Seventh Circuit termed safety plans a "boon to parents" (App. 17a), and stated that it could not understand how parents are "made worse off by being offered a safety plan." App.16a. It elaborated: "It is rare to be disadvantaged by having more rather than fewer options. If you tell a guest you will mix him either a Martini or a Manhattan, how is he worse off than if you tell him you'll mix him a Martini?" *Id.*

4. The District Court's Dismissal Order, and the Seventh Circuit's Final Decision

On remand, DCFS moved for summary judgment. In the briefing accompanying that motion, the parents conceded that they could not establish that DCFS implemented safety plans by the "illegal means" of knowing misrepresentations. App.2a. They explained their concession, in part, by noting that DCFS policy provides for implementation of safety plans right at the outset of its "initial investigation," 141 F.Supp.2d at 1093, of the Hotline call allegations and before conducting any meaningful investigation, *see* pp. 4-5, *supra*. Because DCFS investigators have little or no evidence when they secure safety plans, they are not in a position to *mis*represent the evidence.

The district court granted judgment to DCFS and dismissed the plaintiffs' safety plan claims. App.21a, 22-23a. Plaintiffs appealed. The Seventh Circuit, however, affirmed the dismissal based on its interlocutory decision, observing that plaintiffs presented the same arguments as in their earlier appeal. App.3a. The Seventh Circuit thereby incorporated its earlier interlocutory ruling into its final decision. For this reason, plaintiffs refer in this petition to the Seventh Circuit's two rulings as a single decision.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The "interest of parents in the care, custody and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Accordingly, the Third Circuit has held that respect for families' fundamental liberty interests forbids a State from requiring a

parent to live apart from his children except upon "*reasonable and articulable evidence* giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Croft v. Westmoreland County Children & Health Servs.*, 103 F. 3d 1123, 1126-27 (3d Cir. 1997) (emphasis added). The Third Circuit also has held that this evidentiary requirement is not obviated by offering parents a "choice" of having their children taken into foster care or leaving their home. Such a "choice" is "blatantly coercive," *id.* at 1125 n.1, and the resulting exercise of that "choice" is therefore not voluntary, *id.* at 1125.

The Seventh Circuit, in the decision below, created a conflict with this precedent. DCFS has a policy and practice of telling parents that the State may take their children into custody and place them into foster care if they do not agree to "safety plans" that require separation from or substantial restrictions on contact with their children. Yet the Seventh Circuit held that the due process clause *permits* Illinois to effect safety plans based on "mere suspicion" of abuse or neglect (App.15a), which it described as "some inarticulable hunch," *id.* It also held that all safety plans are voluntary. *Id.* The Seventh Circuit's decision therefore conflicts with *Croft*, twice over. *See* § II, *infra*.

The Seventh Circuit's decision also contravenes this Court's precedents.

In securing safety plans based upon a "mere suspicion" of parental abuse or neglect—a policy and practice the Seventh Circuit approved—DCFS essentially puts parents to a "bet the children" choice: either they must "agree" to the DCFS-devised plan restricting parents' and children's contact with each other or run the risk that the State will take the children into State custody. However, under this Court's decisions, which dictate that the State may not constitutionally restrict parents'

liberty interests in the care and custody of their children when there is no *evidence* of parental wrongdoing, the Due Process Clause prohibits putting the parents to such a choice. *See* § III, *infra*. Furthermore, the Seventh Circuit's suggestion that the agonizing choice at the center of this case – between leaving one's family or having one's children taken into State custody – is no different than choosing between a "Martini" or a "Manhattan" at a cocktail party (App. 16a), trivializes the family's fundamental liberty interests. It ignores the "momentum for respect" (*Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citation omitted)), that this Court has repeatedly accorded the parental liberty interest in raising children.

The Seventh Circuit's holdings that all safety plans are voluntary and that the State need not provide any process to contest plans impairing parents' fundamental liberty interests also cannot be reconciled with the Court's decisions. *See* §§ IV-V, *infra*.

II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE THIRD CIRCUIT'S DECISION IN *CROFT*

In *Croft*, a caller to a child protection Hotline "informed" the county that Dr. Croft "was sexually abusing his [four-year old] daughter." 103 F.3d at 1124. Upon meeting with Dr. Croft and his wife, the investigator told Dr. Croft that "unless he left his home and separated himself from his daughter until the investigation was complete, she would take the daughter from their home that night and place her in foster care." *Id.* "Faced with this dilemma, Dr. Croft complied with her ultimatum and left his home, wife, and daughter." *Id.* at 1125.

Croft and the Seventh Circuit's decision create a circuit split on two issues.

1. According to *Croft*, the due process clause requires "reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse" (*id.* at 1126), before the State employs means to separate parents from their children – such as presenting the "choice" it required Dr. Croft to make, or the identical choice that DCFS requires parents here to make when it proffers safety plans to them. *Croft* held that substantive due process requires reasonable and articulable evidence to proffer that "choice." *Id.* In contrast, the Seventh Circuit held that DCFS can separate parents from their children by requiring parents to "choose" between proffered safety plans or risk having their children taken into State custody based upon a "mere suspicion" of wrongdoing. App.15a.

Straining to distinguish *Croft*, the Seventh Circuit said that the "threat" (App. 18a) to place the child in foster care if Dr. Croft "didn't leave the family home immediately" was "not grounded in proper legal authority." *Id.* The suggestion is that DCFS's threats to take custody of children if parents refuse safety plans *are* grounded in such authority. Yet, as the Seventh Circuit conceded, "mere suspicion" of abuse or neglect "is *not* a statutory ground [in Illinois] for actually removing a child from his parents' custody." App.15a (emphasis added). The Seventh Circuit's attempt to distinguish *Croft* therefore fails under its own concession that "mere suspicion" is no more "proper legal authority" for Illinois to threaten taking custody of a child than it was for Pennsylvania to do so. *See Croft*, 103 F.3d at 1126.

2. The second split concerns whether a State's threats to take a child into State custody if the parent does not leave the home are unconstitutionally coercive, as *Croft* held, or, by contrast, whether parents' acquiescence to such threats is always voluntary, as the Seventh Circuit

held. In *Croft*, the investigator told Dr. Croft that "unless he left his home and separated himself from his daughter until the investigation was complete, she would take the daughter from their home that night and place her in foster care." The Third Circuit called this statement an "ultimatum." 103 F.3d at 1125. The Third Circuit "explicitly reject[ed]" the defendants' characterization of Dr. Croft's "choice" to leave his home and his wife and his daughter as "voluntary," stating that the investigator's ultimatum was "blatantly coercive" and that attempts to portray the Dr. Croft's decision as "voluntary" were "not well-taken." *Id.* at 1125, n.1.

The district court likewise found that "investigators affirmatively threatened to take away Plaintiffs' children unless they agreed to a safety plan." App.93a. And the record is replete with specific examples of just such threats, which are indistinguishable from the one that the county child welfare authorities directed to Dr. Croft, *see* pp. 6-7, *supra* (citing examples from record). Yet, in conflict with the Third Circuit in *Croft*, the Seventh Circuit held that parents' choices to accept safety the plans here, exacted by such threats, are always voluntary.

III. THE SEVENTH CIRCUIT'S DECISION ALLOWING DCFS TO "OFFER" SAFETY PLANS UPON "MERE SUSPICION" CONFLICTS WITH THIS COURT'S DECISIONS

In *Troxel v. Granville*, 530 U.S. 57 (2000), this Court reiterated that the "interest of parents in the care, custody and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65. *Accord, M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("[c]hoices about marriage, family life, and the upbringing of children are among the associational rights that this Court has ranked as 'of basic importance in our society'") (citation omitted).

In *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), this Court stated that "[w]e have little doubt that the Due Process Clause would be offended '[i]f a State were to *attempt to force* the breakup of a natural family, over the objections of the parents and their children, *without some showing of unfitness* and for the sole reason that to do so was thought to be in the children's best interest'" (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J. concurring in judgment)) (emphasis added). Yet, the Seventh Circuit held that "mere suspicion," which it defined as some "inarticulable hunch" (App.15a), suffices for the State to "offer . . . a safety plan" (App. 16a), which restricts the family's choice to remain together.

When DCFS investigators present safety plans to parents, they are not required to have evidence establishing an *objectively reasonable* suspicion of wrongdoing. And rarely do they have such evidence, since DCFS proffers safety plans at the outset of its investigation, following a Hotline call as to which there has been no meaningful investigation. *See* pp. 4-5, *supra*. Indeed, DCFS never secures credible *evidence* in most cases, given that it ultimately determines two-thirds of the Hotline allegations to be unfounded. App. 31a.

DCFS's safety plan practices, which the Seventh Circuit approved, do precisely what *Quillion* says the Due Process Clause forbids. Indeed, DCFS's "offers" – that parents and children separate or restrict their contact with each other or risk having the children taken into State custody -- are more than mere "*attempt[s]*" to "force the breakup of a natural family." *Quillion*, 434 U.S. at 255 (emphasis added). They are practices that invariably *succeed* in forcing such family breakups, since no parents reject plans. App.93a. Moreover, *Quillion* establishes that the Due Process Clause affords no authorization to make such "offers" (App. 14a) at all absent *evidence* of parental wrongdoing: when *Quillion* says that, to

force the breakup of the natural family, a "showing of unfitness" (434 U.S. at 255) is required, that "showing" anticipates *evidence of* wrongdoing, not simply an "inarticulable hunch" (App.15a) of wrongdoing, the standard the Seventh Circuit approved. *Accord, Troxel*, 530 U. S. at 68 (invalidating state law permitting judges to override parent's limitations on grandparent visits that the judge believed not to be in the best interests of children, when "*no court ha[d] found . . . [the parent] unfit*") (emphasis added).

The Seventh Circuit characterizes each safety plan "offer" as affording an "option" to parents: to agree to a safety plan (and its prohibitions and restrictions on family life) or to refuse to agree and thereby risk having children taken into foster care. App. 13a. But *M.L.B.* characterizes "*[c]hoices* about marriage, family life, and the upbringing of children [as] among the associational rights this Court has ranked as 'of basic importance in our society,'" 519 U.S. at 116 (citation omitted) (emphasis added). *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997), in turn, says that the "substantive component" of the Due Process Clause "provides heightened protection against *governmental interference* with [these] fundamental rights and liberty interests") (emphasis added). *And see Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("the custody, care and nurture of the child reside *first with the parents*, whose primary function and freedom include preparation for obligations *the state can neither supply nor hinder*") (emphasis added). It follows that when DCFS, absent evidence of parental wrongdoing, substitutes its *own* judgment for that of the parents as to the "option[s]" (App.13a) that are in the "best interests of the[] children," *Troxel*, 530 U.S. at 68, it preempts the parents' authority as decision makers in violation of their fundamental liberty interests. Further, when DCFS proffers to parents choices between just two "options," both of which would severely

"curtail[]" (App.13a) parents' association with their children, DCFS impairs parents' fundamental liberty interests.

The Seventh Circuit analogizes the State's "offers" of safety plans to plea bargains. App.14a. But a State may not proffer a "choice" to a criminal suspect of pleading guilty to lesser offense or facing trial on a greater one, unless it *first* establishes "probable cause" to believe the suspect has committed the greater offense. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). In contrast, DCFS needs no evidence of wrongdoing to proffer safety plans to parents, but only an "inarticulable hunch" (App.15a) of it. If the Seventh Circuit's analogy were apt, DCFS could not proffer safety plans absent reasonable suspicion of abuse or neglect.

When a person is offered a "Martini or a Manhattan" (App.16a), he always retains the option of declining both drinks. Though it has no evidence of parental wrongdoing, DCFS does not offer parents the option of no restrictions on their family life when it "offers" safety plans.

IV. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS DEFINING WHEN AGREEMENTS ARE COERCED OR, IN CONTRAST, VOLUNTARY

The Seventh Circuit held that safety plans agreements are voluntary, so that DCFS need not afford parents due process protections that involuntarily-imposed plans would require. But DCFS secures some safety plans not by signed agreement but by oral directives that a parent is to leave the home. App.45a, 58-59a. Such directives are not "voluntary" agreements.

In rejecting the parents' contention that plan agreements are often coerced, that Seventh Circuit held that "coercion is objectionable" only if the State

uses "illegal means . . . to obtain" safety plans. App.15a. The only example the Seventh Circuit offered of such "illegal means" was a knowingly false representation. App.17a. It concluded that because DCFS does not employ such misrepresentations or other "illegal means" of coercion, safety plans are voluntary. App.15a.

Even on its own terms, the Seventh Circuit's determination that all safety plans are voluntary is dubious. For, as it acknowledged, DCFS investigators routinely imply to parents that DCFS has "lawful grounds" to take custody of their children when it has no such grounds, but only "mere suspicion" (App.14a-16a) of wrongdoing. Such DCFS representations about "lawful grounds" *are* therefore *misrepresentations.*

Under this Court's decisions, coercion does not require a showing of "illegal means," so the Seventh Circuit's conclusion that safety plans are never coerced is incorrect. *See* § IV.A, *infra.* Moreover, its related determination that safety plans are voluntary contradicts the well-established "totality of the circumstances" test for voluntariness that this Court's decisions establish. *See* § IV.B, *infra.*

A. The Seventh Circuit's Decision Conflicts with this Court's Decisions Defining Coercion or Duress

Numerous decisions of this Court establish when illegal means are used to secure an agreement or action, such means may vitiate the voluntariness of the agreement or action. *E.g., Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960). Yet this Court's decisions also establish that the government may be deemed to have coerced agreements from its citizens even when it does *not* employ "illegal means" to secure them. The Seventh Circuit cites no authority for its view that the *singular* test for

adjudging whether the State has "coerced" an agreement is whether it has used "illegal means."

In *Steffel v. Thompson*, 415 U.S. 452 (1974), police told Steffel that if he did not stop handbilling, he would be arrested under a trespass statute. *Id.* at 455. Steffel left to avoid arrest and did not return, but brought an action seeking a judgment that the trespass statute was unconstitutional. *Id.* at 454-55. In *MedImmunine v. Genentech*, 127 S. Ct. 764 (2007), this Court discussed whether Steffel's nominally "'voluntary' refusal to distribute handbills" had been "coerc[ed]." 127 S. Ct. at 775 n.12. This Court held that Steffel's conduct had been coerced because of the "penalties for . . . trespass [with which Steffel was] threatened" – even though the risk to Steffel was uncertain. *Id.* *See* 415 U.S. at 456 (he "*might be* arrested") (emphasis added), *id.* at 515-16 (if charged, he might be acquitted). Similarly, in *Terrace v. Thompson*, 263 U.S. 197 (1923), the State threatened the plaintiff landowner with forfeiture of the leasehold interest in a farm if he leased it to an alien in violation of a state statute. *Id.* at 211-12. As *MedImmune* explained, the landowner's nominally voluntary action in "simply not doing what he claimed the right to do (enter into a lease . . .)" was "effectively coerced," 127 S. Ct. at 772 (citing *Terrace*, 263 U.S. at 215-16), because of the "genuine threat of enforcement" of the statute. *Id.* Moreover, as in *Steffel*, it was uncertain whether, even if the landowner in *Terrace* had leased the farmland to an alien, the landowner would suffer the threatened forfeiture, since the state statute might be determined invalid in state civil or criminal proceedings to enforce it, *see Terrace*, 263 U.S. at 215.

Steffel and *Terrace* establish that the seriousness of the threatened harm if citizens do not acquiesce to the State's demands or requests may oblige the conclusion that their acquiescence has been coerced. More specifically, the "coercion

principle," *MedImmune*, 127 S. Ct. at 775 n.12, grounding both decisions does not turn on whether the State uses "illegal means" to secure acquiescence, *or* that the "consequences" threatened are "illegal" *or* certain. *Accord id.* ("We find the threat of treble damages [by respondent] and loss of 80% of petitioner's business . . . coercive . . . . [T]he *consequences of* the threatened action in this case [are determinative].) (emphasis added). *See Frost v. R.R. Comm'n*, 271 U.S. 583, 593 (1926) ("constitutional guarantees . . . are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lack none of the elements of compulsion").[2]

The seriousness of the harm that DCFS threatens if the parents do not agree to the DCFS safety plans—the State taking custody of the children and placing them in foster care—is far more serious than the "modest penalties for misdeameanor trespass" in *Steffel* that the *MedImmune* Court considered "coercive," 127 S. Ct. at 775 n.12.

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2 This Court's constitutional and federal common law duress jurisprudence is rooted in the state common law. *See Dickerson v. United States*, 530 U.S. 428, 422 (2000). State Supreme Court common law duress decisions, but not the Seventh Circuit's decision, therefore are in line with the cases like *Steffel, Terrace, MedImmune and Frost. See Haston v. Crowson*, 808 So.2d 17, 22 (Ala. 2001) ("the doctrine of . . . duress [applies when] . . . unjustified demand are made, under such circumstances that the victim has little choice but to accede thereto") *Capps v. Georgia Pac. Corp.*, 253 Ore. 248, 253, 453 P.2d 935, 938 (1969) (choice of signing release or facing expensive litigation to recover money owned presents claim of duress, citing with approval Restatement (Second) of Contracts 938 § 492 (1932) for the rule that "[d]uress . . . means . . . any wrongful threat of one person . . . that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement").

Moreover, while the Seventh Circuit noted that the safety plan form "just notifies the parents of the lawful measures that *may ensue*," App.16a (emphasis added), those "measures" (the State taking custody of children) are no more uncertain than were the threatened consequences in *Steffel* and *Terrace*.

Further, the Seventh Circuit did not question that, out of tens of thousands of parents to whom DCFS has "offered" plans, not one has ever refused a plan. *See* App. 93a. Accordingly, the Seventh Circuit's contention that parents have only "to thumb their nose at the offer [of safety plans]" (App. 15a) does not describe parents' actual understanding of their options. *See, e.g.*, App. 62a. Indeed, that no parents ever actually thumb their noses at safety plans suggests that most, if not all of them, view DCFS as very likely if not certain to carry out its threats to take custody of the children if they do not agree to the plans. And, while the threat of serious harm, of itself, may make a threat coercive, *see* cases cited in § IV.A. *supra*, the apparent likelihood or certainty of such harm makes the threat even more coercive. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 22, 32 (1990) (where tax payer is certain of tax penalty for late payments, timely payments are exacted "under duress"). More importantly, even if parents deem the risk slight, duress remains, for no reasonable parent would refuse a safety plan and thereby "bet their children" that DCFS would not take custody of the children from them, *see* § III, *supra*.

B. The Seventh Circuit's Decision Conflicts with this Court's Decisions Defining a "Totality of All the Surrounding Circumstances" Test for Voluntariness

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), this Court held that whether an individual's agreement or consent is a *voluntary* waiver of a protected liberty interest is to be determined by the

"totality of all the surrounding circumstances," *id.* at 226, and that the government has the burden of proving consent. *Id.* at 222. *See Dickerson*, 530 U.S. at 433 (reaffirming continuing vitality of "totality of all the surrounding circumstances" as the applicable "due process . . . test" for voluntariness).

Under *Schneckloth*, a threat of serious harm may be a "circumstance" that, by itself, vitiates the voluntariness of agreements the State secures. *See* cases cited in § III.A *supra*. But coercive threats are just one of many "circumstances" that may do so. Others include: (a) unequal bargaining power between the parties (*D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972)); (b) a party's "lack of education" or "low intelligence" (*Schneckloth*, 412 U.S. at 226); (c) a party's lack of sufficient information to make an informed decision (*id.*); (d) the time pressure on a party to agree, and a party's lack of access to counsel or advisers to decide whether to agree (*Lynumn v. Illinois*, 372 U.S. 528, 534 (1963)); (e) "the characteristics of the accused," such as the "possibly vulnerable subjective state of the person who consents," (*Schneckloth*, 412 U.S. at 229).

The absence of any one or more "circumstance(s)" does not dictate that an agreement is "voluntary." *See Florida v. Bostick*, 501 U.S. 429, 437, 439 (1991) (lower court erred in resting its conclusion that there was no seizure "on a single fact–that the encounter took place on a bus–rather than on the totality of the circumstances").

The Seventh Circuit's default, in terms of the "totality of all the surrounding circumstances" test that *Schneckloth* prescribes, is that, in adjudging that the safety plans are always voluntary, it considered but a *single* "circumstance": whether DCFS had employed "illegal means," such as knowing misrepresentations (App.2a, 19a), to secure safety plans. Such an analysis is erroneous on its

own terms. *See* § III.A., *supra*. But, precisely because the Seventh Circuit considered only this single circumstance, it also cannot be squared with *Schneckloth* and its companion decisions cited in this section. The district court made many findings, not questioned by the Seventh Circuit, of "surrounding circumstances" *apart from* the threats that the Seventh Circuit erroneously dismissed as *not* unconstitutionally coercive, that would have supported a conclusion that many, if not substantially all, safety plans are involuntary.[3] Moreover, the court of appeals applied its "single circumstance analysis" to some cases where there was no safety plan agreement with the parents but only a directive, or where such an agreement was with one of the parents only, *see* p. 7, *supra* (citing to district court findings, also not questioned by court of appeals). In these cases, without any agreements between a parent and DCFS, there can be no *voluntary* agreement. *See also Georgia v. Randolph*, 547 U.S. 103, 114-17 (2006) (wife has "no recognized authority in law or social practice" to consent to police search of marital home, when her husband objects to search).

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[3] *See* App.40a, 43a, 44a, (re: parents and DCFS have unequal bargaining power: "[n]early every class member witness who signed a safety plan testified that the investigator simply presented a proposed plan for his/her signature"; "virtually every parent or caretaker confronted with a safety plan ends of signing it"; "little or no discussion of the plan terms or alternatives"); *id.* (re: lack of information: DCFS gives parents no information permitting them to make an informed choice; "families [do not] receive a copy of the CERAP Safety Determination Form, which details the underlying basis for the safety plan"); App.54a, 62a, 65a (re: "characteristics of the accused," including the "possibly vulnerable subjective state of the person who consents:" *e.g.*, "frantic" mother (Christine Parikh); disabled mother and family left "prisoners" (Redlins); mother with history of bipolar disorder and depression (Debra C.)).

V. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING PROCEDURAL DUE PROCESS FOR PERSONS DEPRIVED OF LIBERTY INTERESTS

The Seventh Circuit acknowledged that if safety plans involuntarily separate parents from their children, or impose significant restrictions on their contact with each other, then DCFS is constitutionally required to afford the parents some process to contest the plans. App.13a. Numerous decisions of this Court confirm this conclusion. *See, e.g., Reno v. Flores*, 507 U.S. 292, 306-07 (1993); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972). The Seventh Circuit nevertheless rejected plaintiffs' procedural due process claim based solely on its determination that all safety plaintiffs are voluntary. App.13a; App.14a ("There is no right to a hearing when . . . . [t]he State does not force a safety plan on the parents."). Because this determination is erroneous, *see* § IV *supra*, the Seventh Circuit's corresponding rejection of the parents' procedural due process claim is erroneous as well.

Critically, the Seventh Circuit misstated the procedural due process claim the parents advanced when it said that they sought "a hearing *before* they are offered the option of agreeing to . . . a [safety] plan." App.14a (emphasis added). The parents never made any such plea. Throughout the litigation, the parents maintained that the Due Process Clause permits procedural protections to be afforded *after* a safety plan is imposed so long as the post-deprivation process is prompt and meaningful. The parents' argument in the Seventh Circuit thus was that the district court erred in affording them constitutionally inadequate *post-deprivation* process to contest the *imposition* of safety plans. In advancing this limited argument, the parents drew upon the decisions of this Court that establish that, even when the State threatens to impose constitutionally cognizable

deprivations, it need not provide pre-deprivation process when exigent circumstances require quick action or it would otherwise be impractical to provide pre-deprivation process. *E.g.*, *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *Barry v. Barchi*, 443 U.S. 55, 66 (1979). Such exigent circumstances are certainly present in cases in which DCFS claims reasonable suspicion of wrongdoing, based on evidence that a parent has abused or neglected a child. Whether DCFS in fact has the requisite evidence would be the usual issue at any post-deprivation hearing, making such a hearing analogous to a post-arrest probable cause hearing in the criminal process.

The Seventh Circuit said that a "safety plan seems a sensible . . . solution" (App. 17a-18a), suggesting that what the court (incorrectly) describes as the parents' plea for *pre-deprivation* process, if approved, would seriously jeopardize DCFS's efforts to "protect [ ] [children] against abuse and neglect," *id.* at App. 18a. But as explained, the parents pressed no such plea, and the district court, citing DCFS's own experts, concluded that "it would not be difficult for DCFS to develop a simple and inexpensive procedure for Plaintiffs to seek review of safety plans [after the plan has been in effect]." App.96a.

The Seventh Circuit held "the offer of a [safety plan] settlement no more impairs those [procedural due process] rights than a prosecutor's offer to accept a guilty plea impairs the defendant's right to trial by jury." App.14a. But that analogy illuminates the error in the Seventh Circuit's analysis. A criminal defendant's agreement to a plea offer, incident to entry of a guilty plea, comes after the State's negotiations with the defendant's counsel (defendant's representation by counsel being constitutionally assured), with reasonable time afforded the defendant to consider the merits of the plea offer in light of the evidence. Moreover, *before* the trial judge accepts a defendant's guilty plea on

which the plea agreement is conditioned, the judge is required to ensure that the defendant understands and knowingly intends to waive *all the procedural rights* (*e.g.*, a right to trial by jury) that he would have if he refused the plea offer and put the government to its burden. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). In contrast, parents proffered a safety plan must decide immediately whether to accept or reject the plan and rarely, if ever, do they have the advice of counsel or any adviser to assist them in making this decision. *See* pp. 4-5, *supra*. Nor does DCFS have any procedures in place under which a neutral person even inquires whether parents' agreements to the plans were knowing and voluntary ones. *See* App.49a.

CONCLUSION

The petition for a writ of certiorari should be granted.

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United States Court of Appeals,Seventh Circuit.
Belinda DUPUY, et al., Plaintiffs-Appellants,

v.

Erwin McEWEN, Acting Director, Illinois Department of Children and Family Services, Defendant-Appellee.

No. 07-1655.

Submitted April 25, 2007.
Decided July 31, 2007.
Rehearing and Suggestion for Rehearing En Banc Denied Oct. 15, 2007.

Jack L. Block (submitted), Reed Smith, Jeffrey B. Gilbert, Johnson, Jones, Snelling, Gilbert & Davis, Robert E. Lehrer, Lehrer & Redleaf, Diane Redleaf, Redleaf Law Firm, Chicago, IL, for Plaintiffs-Appellants.

William G. Sullivan (submitted), Martin, Brown & Sullivan, Jack J. Carriglio, Meckler, Bulger & Tilson, Chicago, IL, for Defendant-Appellee.

Before EASTERBROOK, Chief Judge, and POSNER and EVANS, Circuit Judges.

POSNER, Circuit Judge.

This class action suit by parents, now in its eleventh year, challenges a range of practices by the child-welfare agency of the State of Illinois that are claimed to infringe parental rights protected by the due process clause of the Fourteenth Amendment. The case has twice been before us. *Dupuy v. Samuels,* 397 F.3d 493 (7th Cir.2005), 465 F.3d 757 (7th Cir.2006). In the second case, while affirming a preliminary injunction because the defendant had

not appealed from its entry (instead the plaintiffs had appealed, contending the injunction didn't go far enough-we rejected the contention), we expressed, by way of guidance for the trial on the merits (only a *preliminary* injunction had been granted), our doubt about its soundness. The preliminary injunction required administrative review before the child-welfare agency could offer parents a "safety plan" in lieu of removing a child that it suspected of being neglected or abused from its parent's custody. (The safety plan might, for example, require that one of the parents move out of the home until the question of abuse or neglect was resolved.) We pointed out that as long as the parents weren't coerced to accept a safety plan by being given false information about the consequences of refusing, there was no reason to require administrative or judicial review of the offer-it was just an offer, which the parents would not accept unless they thought it would make them better off to do so.

When the case resumed in the district court, the agency moved for summary judgment on the ground that there was no evidence of misrepresentation. The plaintiffs agreed, so the district judge entered summary judgment, but they appealed anyway and now oppose the defendant's motion for summary affirmance on the ground that the motion is not within any of the categories that *United States v. Fortner,* 455 F.3d 752, 754 (7th Cir.2006), deems appropriate for summary affirmance. They misread *Fortner.* The concern in that case was with an appellee's filing a motion for summary affirmance at the last minute, that is, right before the briefs on the merits were due to be filed. That made needless additional work for the appellant and for the court. There are situations (*Fortner* gives three examples) in which the last-minute filing is proper-suppose a case had just been decided by the Supreme Court

that made affirmance a slam dunk. There would be no purpose in requiring full briefing.

The motion in this case was filed well before the appellant's brief was due, and the plaintiffs have had and taken an opportunity to respond. Remember that they conceded in the district court that they had no evidence that would satisfy the standard we set forth in our previous opinion. They do not retract that concession in their opposition to the motion but (besides expressing disagreement with our opinion without presenting any new argument) contend merely that some of the class members "lack education" or have "low intelligence." The class, however, is not limited to the uneducated or the unintelligent, and a plaintiff obviously cannot obtain class-wide relief for harms suffered by only some of its members. *General Telephone Co. v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); *Oshana v. Coca-Cola Co.,* 472 F.3d 506, 513-14 (7th Cir.2006).

The district judge's order that this appeal unavailingly challenges was one of several orders that she issued in an attempt to resolve three separate sets of claims pressed in this litigation; and it may provide helpful guidance to the district court to note our concern with the third order, which purports to retain jurisdiction of a terminated case. The three sets of claims are as follows: "Dupuy I" as we'll call it sought special procedures for child-care workers accused of abuse or neglect. Dupuy II complained that the safety plans had been coerced, and it is that set of claims that was before us in the prior appeal and is before us in this appeal. Dupuy III sought additional procedures for accused child-care workers.

The district judge first entered an order which stated that the Dupuy I and III claims were

dismissed without prejudice, but in the next paragraph she stated that they "shall be dismissed with prejudice in accordance with the terms of the stipulation," that is, a settlement of those claims. It is apparent that she intended to dismiss with prejudice only the claims of the named plaintiffs, because they were the only parties to the settlement. Three days later, however, having meanwhile granted summary judgment on the Dupuy II claims, she entered a "termination order" stating that the entire case was "dismissed with prejudice." That order wiped out the claims of the unnamed class members, apparently inadvertently, since they had not been parties to the settlement. The plaintiffs moved the judge to vacate the order, and she did, thus restoring the order that had dismissed the unnamed class members' Dupuy I and III claims without prejudice. She added that with respect to the named class members' Dupuy I and III claims she was "retain[ing] jurisdiction as provided in the Parties' stipulation." In the stipulation, the plaintiffs had expressly released the defendant from all claims "which arose or could have been raised" in the suit; that was a general release. *Fair v. International Flavors & Fragrances, Inc.*, 905 F.2d 1114, 1116 (7th Cir.1990).

The district judge's attempted retention of jurisdiction to enforce the stipulation is the troublesome part of the last order. In *Lynch, Inc. v. SamataMason, Inc.*, 279 F.3d 487, 489-90 (7th Cir.2002), and *Shapo v. Engle*, 463 F.3d 641, 643 (7th Cir.2006), we ruled, in reliance on *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), that when a suit is dismissed with prejudice, it is gone, and the district court cannot adjudicate disputes arising out of the settlement that led to the dismissal merely by stating that it is retaining jurisdiction. See also *Blue Cross & Blue Shield Ass'n v. American Express*

Co., 467 F.3d 634, 636 (7th Cir.2006). Other cases, discussed in Morton Denlow, "Federal Jurisdiction in the Enforcement of Settlement Agreements: *Kokkonen*Revisited," 2003 *Fed. Cts. L.Rev.* 2 (2003); Denlow, "What Is an Attorney to Do? Ensuring Federal Jurisdiction Over Settlement Agreements in Light of Recent Seventh Circuit Cases,"*The Circuit Rider: The Journal of the Seventh Circuit Bar Association,* May 2007, p. 24, assume that combining dismissal with prejudice with retention of jurisdiction to enforce the settlement is a permissible method of retaining authority to decide disputes arising from the settlement. The principal argument that Magistrate Judge Denlow makes for that procedure is that a defendant is unlikely to settle a case unless the case is dismissed with prejudice, as otherwise the defendant would be exposed to a repeat suit by the plaintiff, and therefore settlements that the district court is empowered to enforce will be discouraged. The obvious alternative, however, as suggested in *Shapo v. Engle, supra,* 463 F.3d at 646, is for the court to dismiss without prejudice but the parties to include in the settlement a release of the defendant (as was done here, making dismissal with prejudice redundant). That has the same effect as enabling a dismissal to be pleaded in a subsequent suit as res judicata, but avoids the paradox of dismissing a case with finality yet at the same time retaining it.

Magistrate Judge Denlow expresses concern that a release does not give a defendant as much security against further suit as a dismissal with prejudice, which allows the dismissal to be pleaded as res judicata. But both accord and satisfaction (the formal legal name of a release) and res judicata are affirmative defenses to a subsequent suit, and if the district court, by having dismissed without prejudice, retains the power to enforce the settlement, it can enforce the release (a term of the settlement)

directly, without putting the defendant to the trouble of having to plead release as a defense in a renewed suit. It is true that dismissal without prejudice, because it merely allows the suit to be refiled, will allow adjudication of issues relating to the settlement only if the refiled suit is timely; and when a suit is dismissed without prejudice, the statute of limitations continues to run from the date (normally the date of the injury) on which the claim accrued. E.g., *Coleman v. Milwaukee Board of School Directors,* 290 F.3d 932, 934 (7th Cir.2002); *United States v. Carlone,* 666 F.2d 1112, 1113-14 (7th Cir.1981). But the statute of limitations is just another affirmative defense, which the parties can waive in the settlement if they want the district court to be able to adjudicate disputes after the limitations period has run. Alternatively, they can elide any issue of untimeliness by embodying the settlement in a consent decree.

AFFIRMED.

United States Court of Appeals,Seventh Circuit.
Belinda DUPUY, et al., Plaintiffs-Appellants,

v.

Bryan SAMUELS, Director, Illinois Department of Children and Family Services, Defendant-Appellee.
No. 06-1027.

Argued Sept. 20, 2006.
Decided Oct. 3, 2006[1].

Jack L. Block, Sachnoff & Weaver, Chicago, IL, Robert E. Lehrer (argued), Lehrer & Podleaf, Chicago, IL, for Plaintiffs-Appellants.

Barbara L. Greenspan (argued), Erik G. Light, Office of the Attorney General, Chicago, IL, for Defendant-Appellee.

Before POSNER, EASTERBROOK, and EVANS, Circuit Judges.

POSNER, Circuit Judge.

This class action suit by parents, now in its tenth year, challenges a range of practices by Illinois' child-welfare agency claimed to infringe parental rights that are protected by the due process clause of the Fourteenth Amendment; for background, see *Dupuy v. Samuels,* 397 F.3d 493 (7th Cir.2005). The present appeal is from a preliminary injunction that the plaintiffs, who are the appellants, contend does not go far enough; the defendants have not cross-appealed. The plaintiffs are also attempting to appeal from the judge's class certification order, which they contend defined the plaintiff class too

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[1] This opinion will be published, but is being released in typescript.

narrowly. But their time to appeal from that order has long expired. Fed.R.Civ.P. 23(f).

The injunction of which the plaintiffs complain violates Rule 65(d) of the civil rules (though that is not the plaintiffs' complaint about it), which requires that an injunction be a self-contained document rather than incorporate by reference materials in other documents. The purpose is to minimize disputes over what has been enjoined. *Schmidt v. Lessard,* 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974) (per curiam); *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n,* 389 U.S. 64, 74-76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967); *D. Patrick, Inc. v. Ford Motor Co.,* 8 F.3d 455, 461 (7th Cir.1993); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2955 (2d ed.1995); 13 *Moore's Federal Practice* § 65.60, pp. 475-77 (13th ed.2006). The Ninth Circuit allows incorporation by reference if the material thus incorporated is physically attached, as by stapling, to the injunction order. *Reno Air Racing Ass'n, Inc. v. McCord,* 452 F.3d 1126, 1132-33 (9th Cir.2006); *California v. Campbell,* 138 F.3d 772, 783 (9th Cir.1998). There is no reason to complicate the administration of the rule by such an interpretation. There are times when literal interpretation is best; this is one of them. The Ninth Circuit's approach would encourage just the kind of mistake that the rule aims to prevent-the thoughtless attachment of separately composed documents when if the judge had integrated their contents into the injunction order he might have realized that they would not cohere with the rest of the order without changes.

Rule 65(d) is simple, clear, sensible, easily complied with, and not even new; we are distressed by the failure of the parties and the district judge to have complied with it in this case-a case that underscores the good sense of the rule. What the

parties and the district judge understand to be the injunction begins with an opinion by the judge in which she says that "the court approves the DCFS proposal, with certain modifications, outlined below," and the "outline" follows. If the "certain modifications" were literally an "outline," there would be no injunction but merely the sketch of one. But it is apparent that the word "outlined" was used imprecisely; and likewise that when the court, as one of its modifications, said vaguely that "the court *would* add a statement to this effect..." (emphasis added), it meant that the language that followed was part of the injunction. Yet one of the "modifications" modifies nothing; it says merely that "the court *recommends* that the plan provide" etc.-and a recommendation cannot be an injunction.

Both sides are complicit in the violation of Rule 65(d), having expressed no concern with the form of the injunction. But the appellants in addition violated 7th Cir. R. 30(d), which requires certification that the appendix contain all materials required by Rule 30(a) to be included in the appendix. For among the retired materials are the judgment, and the judgment in this case includes not only the judge's order modifying the defendant's proposed injunction, *Chicago & North Western Transportation Co. v. Railway Labor Executives' Ass'n,* 908 F.2d 144, 149-50 (7th Cir.1990), but also those portions of that proposed injunction that the judge (improperly) incorporated by reference. They do not appear in the appellants' appendix but instead are deeply buried in the record; the lawyers could not find them when asked for them at argument.

So Rule 65(d) was flouted. But a violation of the rule does not deprive the appellate court of jurisdiction to review the injunction (e.g., *Combs v. Ryan's Coal Co.,* 785 F.2d 970, 978 (11th Cir.1986)) unless as a result of the violation it is so unclear

what the defendant is enjoined from doing that he could not be punished for violating the injunction. For in that event he would lack standing to challenge the injunction because, being unenforceable, it would place no burden on him. He could thumb his nose at it with impunity. *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 299 F.3d 643, 646-47 (7th Cir.2002); *Chicago & North Western Transportation Co. v. Railway Labor Executives' Ass'n, supra*, 908 F.2d at 149-50; see also *Bates v. Johnson*, 901 F.2d 1424, 1428 (7th Cir.1990). "[A]n unenforceable order is no order at all." *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., supra*, 299 F.3d at 647.

The power to review an injunction that violates Rule 65(d) extends to any adequately clear materials clearly incorporated into the injunction by reference, as we held in *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 275-76 (7th Cir.1992); cf. *Abbott Laboratories v. Unlimited Beverages, Inc.*, 218 F.3d 1238, 1241-42 (11th Cir.2000). And that is this case. The core of the injunction is clear enough to be enforceable; it requires the defendant to provide informal administrative review of "safety plans."

There is tension between the holding in *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., supra*, and *D. Patrick, Inc. v. Ford Motor Co., supra*, which states that an injunction that incorporates materials by reference cannot be enforced, though the court went on to find that in any event the incorporated material-a settlement agreement-was ambiguous. 8 F.3d at 461-62. *D. Patrick* did not cite *Great American*, and its flat statement of unenforceability, which is not limited to incorporation by reference but embraces any injunction that violates Rule 65(d), is inconsistent with the decisions holding that a

violation of the rule does not affect the jurisdiction of the reviewing court as long as the obligations that the injunction imposes on the defendant are clear enough that he can be punished should he violate them.

D. Patrick justified its unorthodox position by quoting from *H.K. Porter Co. v. National Friction Products Corp.*, 568 F.2d 24, 27 (7th Cir.1977), that "Rule 65(d) is no mere extract from a manual of procedural practice. It is a page from the book of liberty."8 F.3d at 461. Beware decision by metaphor. What the court seems to have meant was that it would be unjust to punish someone for violating an injunction that he could not understand. It would be. But Rule 65(d) is not needed in order to ward off that injustice; if the injunction is not clear, the defendant cannot be punished for violating it, Rule 65(d) or no Rule 65(d). The purpose of the rule is to make sure that violations of injunctions *are* punishable.

The lofty language of *H.K. Porter* is particularly inapt when as in this case it is the plaintiff that is appealing the injunction. For it is then much as if the plaintiff were appealing from the denial of injunctive relief altogether, which would present no problem under Rule 65(d). The difference is that when there *is* an injunction and the plaintiff is seeking additional relief, the need for that relief is likely to depend on what relief the judge has already granted, and to be able to form a precise and concise understanding of that relief may require that the rule have been complied with.

Enough said about the procedural issue. Let us turn to the merits, and explain what a "safety plan" is.

If the State of Illinois (1) "has reason to believe that the child cannot be cared for at home or in the custody of the person responsible for the child's welfare without endangering the child's health or safety; and (2) there is not time to apply for a court order...for temporary custody of the child," the state can take the child into "temporary protective custody" without additional process, 325 ILCS 5/5, but there is a right to a judicial hearing within 48 hours. 705 ILCS 405/1-3, -5, 405/2-9(1), (3); *In re John Paul J.*, 343 Ill.App.3d 865, 278 Ill.Dec. 904, 799 N.E.2d 769, 776 (Ill.App.2003). Other states have similar laws, though often they require "reasonable cause" or "probable cause" rather than "reason to believe," Alyson Oswald, "Comment, They Took My Child! An Examination of the Circuit Split Over Emergency Removal of Children From Parental Custody," 53 *Cath. U.L.Rev.* 1161, 1183 n. 131 (2004), although it is doubtful whether there is any practical difference among these formulas, any one of which should satisfy the due process clause of the Fourteenth Amendment. See, e.g., *Berman v. Young*, 291 F.3d 976, 983-84 (7th Cir.2002); *Brokaw v. Mercer County*, 235 F.3d 1000, 1010-11 (7th Cir.2000); *Doe v. Kearney*, 329 F.3d 1286, 1294-95 (11th Cir.2003); *Croft v. Westmoreland County Children & Health Services*, 103 F.3d 1123, 1126-27 (3d Cir.1997). Among the liberties protected by that clause is the right of parents to the custody of their children. *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion). But "when a child's safety is threatened, that is justification enough for action first and hearing afterward." *Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir.1983); see also *Duchesne v. Sugarman*, 566 F.2d 817, 825-26 (2d Cir.1977).

But sometimes, in lieu of immediately removing the child from its parents, the state will offer the parents the option of agreeing to a "safety plan," under which restrictions short of removal are imposed pending completion of the state's investigation into abuse or neglect. The plan might require that one of the parents leave the house where the child is living, or that he keep out of the child's presence unless a designated family member is present as well, or that the child be sent to live with other family members. Although these curtailments of parental rights are less extreme than removing the child from parental custody altogether and sticking him in foster care, they may be invasive enough to count as deprivations of liberty, thus triggering the right to a hearing. The difference from the standpoint of parental rights between removing the parent from the child's home and removing the child from the home is not negligible, because in the first case the child remains in his accustomed residence and often with one of his parents. But it is not great enough to justify concluding that there is no invasion of parental liberty in the first case, *Croft v. Westmoreland County Children & Youth Services, supra,* 103 F.3d at 1125-27, although the amount of process that is constitutionally required may be less since the deprivation is less. See *Gottlieb v. County of Orange,* 84 F.3d 511, 522 (2d Cir.1996).

Critically, however, the decision to agree to a safety plan is optional with the parents. If they think that if they turn down the plan the state will not try to remove the child from their custody, or that if it does they will prevail in the prompt judicial hearing to which they are entitled on the propriety of the removal, they will reject the plan. The plan is thus a form of interim settlement agreement pending the outcome of the investigation, as when a plaintiff in a suit for restitution agrees not to move for

immediate seizure of assets held by the defendant if the latter agrees to place them in judicial custody. It is not surprising that the safety-plan program is not embodied in a statute or formal regulation, but merely in internal directives of the Department of Children and Family Services. It imposes no obligation on anybody.

Which answers the plaintiffs' argument that the Constitution entitles parents to a hearing before they are offered the option of agreeing to such a plan. There is no right to a hearing when no substantive right has been infringed or is threatened with being infringed. The state does not force a safety plan on the parents; it merely offers it. Parents are entitled to a hearing if their parental rights are impaired, but the offer of a settlement no more impairs those rights than a prosecutor's offer to accept a guilty plea impairs the defendant's right to trial by jury.

It is true that by refusing to agree to a safety plan, as by refusing to plead guilty, a person may find himself in a worse pickle than if he had accepted it. The plan might be for the child's father to move out of the house for a week. If he refused, the state might decide to place the child in foster care, and though if it did so the father could demand a judicial hearing, the judge's ruling might go against him. That is a dilemma implicit in any settlement process. If there weren't a downside to refusing to settle, there would be no settlements.

Of course should the state violate the terms of the safety plan and by doing so curtail parental rights beyond what the parents had agreed to, they would be entitled by the Constitution to a prompt hearing. But that is not the complaint.

The plaintiffs are very wroth because, they say, the state sometimes offers a safety plan on the basis

of "mere suspicion" of child abuse or neglect, rather than probable cause or at least reasonable suspicion. But as mere suspicion-some inarticulable hunch-is not a statutory ground for actually removing a child from his parents' custody (Illinois law requires, as we know, that the state have reason to believe that the child is in imminent danger), the parents in such a case have only to thumb their nose at the offer and the agency can do nothing but continue its investigation, which it would do anyway. The plaintiffs complain that the prospect of a hearing if the state removes a child is not adequate because the hearing will not address the details of the safety plan; it will deal exclusively with the validity of the child's removal from the home and therefore, the plaintiffs insist, is inadequate. The argument is silly; a plaintiff might as well say that a tort suit can't be settled without a hearing on the validity of the settlement. Because the safety plan is voluntary, no hearing of any kind is necessary; hearings are required for deprivations ordered over objection, not for steps authorized by consent.

It adds nothing to say as the plaintiffs do that they did not *really* consent-that the state "coerces" agreement to safety plans by threatening to remove the child from his parents' custody unless they agree to the plan. It is not a forbidden means of "coercing" a settlement to threaten merely to enforce one's legal rights. If you sue and before judgment settle because the defendant is willing to settle on more favorable terms than you expect to obtain from pressing the suit to judgment, you've obtained a favorable settlement on the basis of an implicit threat to litigate to an outcome that would make the defendant worse off than if he settled; but you have not infringed any right of his. Coercion is objectionable-and when objectionable is more aptly described as duress or extortion-when illegal means are used to obtain a benefit.

There is no evidence of that. The consent form that the state gives parents requires them if they consent to state in writing that they "understand that failure to agree to the [safety] plan or to carry out the plan may result in a reassessment of my home and possible protective custody and/or referral to the State's Attorney's Office for a court order to remove my children from my home." This just notifies the parents of the lawful measures that may ensue from their failure to agree to a plan or, if they agreed to it, from their violating the plan. There is no suggestion that the agency offers a safety plan when it has no suspicion at all of neglect or abuse, and even in that case the ordinary prerequisite to a finding of duress-that the person have no effective legal remedy against the threat, *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 390 (7th Cir.2002); *Oxxford Clothes XX, Inc. v. Expeditors Int'l, Inc.*, 127 F.3d 574, 579 (7th Cir.1997); *Abbadessa v. Moore Business Forms, Inc.*, 987 F.2d 18, 22-23 (1st Cir.1993)-would be missing, since if a child is actually taken, the parents have a very prompt legal remedy. If the agency has even a bare suspicion, this may ripen in the course of the investigation into cause to obtain a court order of removal, and this possibility is all that the consent form should and does warn the parents of.

We can't see how parents are made worse off by being given the option of accepting the offer of a safety plan. It is rare to be disadvantaged by having more rather than fewer options. If you tell a guest that you will mix him either a Martini or a Manhattan, how is he worse off than if you tell him you'll mix him a Martini? And yet the belief that giving people more options makes them worse off is common, especially in cases involving guilty pleas, as in our recent case of *United States v. Spilmon*, 454 F.3d 657 (7th Cir.2006). The defendant agreed to plead guilty and receive a 57-month sentence. As

part of the plea agreement the government dismissed charges against his wife. The defendant moved to set aside the guilty plea on the ground that he had been coerced to plead guilty by the realization that otherwise his wife would be prosecuted. We affirmed the denial of the motion. We said "it would be in no one's interest if a defendant could not negotiate for leniency for another person. From the defendant's standpoint the purpose of pleading guilty is precisely to obtain a more lenient outcome than he could expect if he went to trial." *Id.* at 658. In words equally applicable to this case, we added that "suppose Spilmon were innocent, and *knowing this* but wanting to convict him the government told him that unless he pleaded guilty it would prosecute his wife-whom it also knew to be innocent. The couple could of course reject the package deal, hoping to be acquitted (being by hypothesis innocent), but given the inherent uncertainties of the trial process they might be afraid to do so, and the result would be a plea of guilty that resulted in the conviction of an innocent person (the husband). That would be a case of duress-that is, of pressure exerted to obtain a result to which the party applying the pressure had no right-and likewise if the government threatened to prosecute the defendant's wife knowing that she was innocent. But it is not duress to offer someone a benefit you have every right to refuse to confer, in exchange for suitable consideration." *Id.* at 658-59 (emphasis added; citations omitted). To the same effect, see *United States v. Miller*, 450 F.3d 270, 272-73 (7th Cir.2006).

The fact that the safety-plan option is a boon to parents may explain why, though similar options are offered by other states, see, e.g., *In re T.A.*, 279 Ga.App. 377, 631 S.E.2d 399, 400 (Ga.App.2006); *In re M.G.T.-B*, 629 S.E.2d 916, 917-19 (N.C.App.2006), lawsuits challenging them have been rare-indeed this is the first we've found. A safety plan seems a

sensible, perhaps indeed an unavoidable, partial solution to the agonizingly difficult problem of balancing the right of parents to the custody and control of their children with the children's right to be protected against abuse and neglect.

The plaintiffs point us to *Doe v. Heck*, 327 F.3d 492, 524-25 (7th Cir.2003), which held, as far as bears on this case, that a state agency violated the Constitution by threatening parents with removing their child from their custody if they did not have their attorney call the agency within 24 hours. But it was a threat the agency had no right to make. It did not suspect the parents of child abuse. The child had been spanked at school, and the agency was investigating the school and wanted to interview the child and the parents were not cooperating. The agency had a right to interview the child, but there are procedures for compelling such an interview, and threatening the parents with the loss of their parental rights was not among the authorized procedures. The case nicely illustrates the line between a lawful threat and duress.

Croft v. Westmoreland County Children & Youth Services, supra, another case on which the plaintiffs place heavy weight, is closer to the present case, but still distinguishable. The defendant's case worker, suspecting that a father was abusing his child but having no objective basis for the suspicion, gave the father an "ultimatum" that if he didn't leave the family home immediately, the agency would place the child in foster care. The court held the threat improper on the ground that the case worker did not have adequate grounds for removing the child from the parents' custody even temporarily. The threat was not grounded in proper legal authority. The coercion about which the plaintiffs complain in this case does not include such ultimata; the consent form informs the parents of the *possibility* that the

child will be removed-information that is in the nature of a truism.

The trial of the merits of the plaintiffs' challenge to the administration of the safety plans is scheduled to begin on October 16. Maybe they'll be able to prove that the state really does coerce agreement to its safety plans wrongfully by misrepresentations or other improper means. They have not done so yet. On the record compiled so far, the plaintiffs are entitled to no relief at all. It is only the state's decision not to file a cross appeal that prevents us from reversing the grant of the preliminary injunction, and that instead requires that the injunction be

AFFIRMED.

United States District Court,
N.D. Illinois,
Eastern Division.

Belinda DUPUY, et al, Plaintiffs,

v.

Bryan SAMUELS, Director, Illinois Department of Children & Family Services, in his official capacity, Defendant.
No. 97 C 4199.

March 9, 2007.

DOCKET ENTRY TEXT

PALLMEYER, District Judge.

Motion to vacate February 26 Dismissal Order (967) is granted. With the final resolution of the three claims asserted in this case (referred to as *Dupuy I*, *Dupuy II*, and *Dupuy III*), and final judgment having been entered, all pending motions are stricken as moot. This case is terminated, but the court retains jurisdiction as provided by the parties' Stipulation.

Docketing to mail notices.

Courtroom Deputy Initials: ETV

United States District Court,
N.D. Illinois,
Eastern Division.

Belinda DUPUY, et al, Plaintiffs,

v.

Bryan SAMUELS, Director, Illinois Department of Children & Family Services, in his official capacity, Defendant.
No. 97 C 4199.

February 26, 2007.

ORDER

PALLMEYER, District Judge.

On December 7, 2005, this court entered an order directing Defendant, the Director of the Illinois Department of Children and Family Services, to make certain changes in its practices for imposing "safety plans" on families of children who were the subject of reports of abuse or neglect. Plaintiffs were unsatisfied by the scope of the relief the court had ordered and appealed the December 7, 2005 ruling to the Seventh Circuit Court of Appeals. Defendant did not cross-appeal.

The Seventh Circuit technically affirmed this court's ruling, but its October 3, 2006 opinion made clear that it did so only because there was no cross-appeal. *Dupuy v. Samuels*, 465 F.3d 757, 763 (7th Cir. 2006). In short, the Seventh Circuit disagreed with this court's conclusions that safety plans were imposed in some instances without the voluntary agreement of affected class members and that some mechanism for review of those

plans was therefore appropriate. In the Seventh Circuit's view, "[o]n the record compiled so far [before this court], the plaintiffs are entitled to no relief at all." 465 F.3d at 763. The Seventh Circuit's opinion left open the possibility that, on remand, Plaintiffs might succeed in proving "that the state really does coerce agreement to its safety plans wrongfully by misrepresentations or other improper means." *Id.*

Taking his cue, Defendant moved the court to dissolve any injunctive relief related to the *Dupuy II* claims and now seeks summary judgment in his favor on those claims. In an affidavit in support of Defendant's motion, Beth Solomon, Senior Litigation Counsel for DCFS, asserts that it is not DCFS's policy or practice to use misrepresentations or improper conduct to impose safety plans and that there is no evidence such methods were used with respect to any of Plaintiffs' witnesses. For their part, Plaintiffs contend that the Court of Appeals erred in holding that safety plans are voluntary as a matter of law; erred in failing to adopt this court's findings of fact; erred in failing to address Plaintiffs' argument that class members' agreement to safety plans are not "knowing and intelligent"; and mischaracterized Plaintiffs' claims concerning the evidence necessary for DCFS to propose a safety plan at all. Plaintiffs nevertheless recognize that this court is "bound to follow the court of appeals' mandate" and therefore "constrained to grant the defendant's motion." (Plaintiffs' Memorandum in Response to Defendant's Motion for Summary Judgment as to the Dupuy II Claims, at 5, 6, 8, 25.) Plaintiffs acknowledge, further, that they do not have evidence that DCFS policies and practices resulted in "systemic and knowing 'misrepresentations' of fact or law" when investigators impose safety plans. *(Id.* at 6 n. 2.)

CONCLUSION

Although they disagree with the Court of Appeals' assessment of the record and its conclusions of law, Plaintiffs acknowledge that this court is bound by those conclusions. Defendant's motion (905) is granted. Plaintiffs' *Dupuy II* claims are dismissed with prejudice.

ENTERED:

Dated: February 26, 2007

/s/ Rebecca R. Pallmeyer
REBECCA R. PALLMEYER
United States District Judge

United States District Court,
N.D. Illinois,
Eastern Division.

Belinda DUPUY, et al, Plaintiffs,

v.

Bryan SAMUELS, Director, Illinois Department of Children & Family Services, in his official capacity, Defendant.
No. 97 C 4199.

December 2, 2005.

ORDER

PALLMEYER, District Judge.

On March 9, 2005, this court entered a Memorandum Opinion and Order addressing Plaintiffs' concerns regarding "safety plans" which impose restrictions on families during the pendency of investigations into allegations of abuse or neglect. *See Dupuy v. Samuels*, No. 97 C 4199, 2005 WL 588997 (N. D. Ill. Mar. 9, 2005). The court concluded, for the reasons explained in that opinion, that safety plans that are more than brief or temporary effect a constitutional deprivation when they are combined with an express or implied threat that failure to comply will result in the Department of Children and Family Service's taking protective custody of children. The court declined to enjoin the imposition of safety plans altogether, but concluded that

> Plaintiffs are entitled to some opportunity to review restrictions placed on their contacts with their children. Further, the court notes its belief that

> persons subject to safety plans are entitled to immediate notice of the basis on which the investigator has determined such a plan is necessary, as well as notice of the expected duration of such a plan and an explanation of the process and schedule for seeking review of restrictions imposed by the plan. As for what those procedures should entail, the court, having found a constitutional violation in this case, now defers to DCFS to fashion an appropriate remedy consistent with this opinion.

Id. at *35.

The proposal submitted by Defendant in response to the court's order refers to August 13, 2002 amendments to certain DCFS procedures referred to as "Appendix G." It provides for revisions to the safety plan form to identify the factors giving rise to a perceived need for a safety plan, and directs that family members and other persons involved in the plan will be provided with a handwritten copy of the plan at the end of the child welfare specialist's visit. The written plan will include an end date or identify a specific event that must occur before the plan is terminated. In addition, the Department's proposal provides for a procedure referred to as a "Safety Plan Team Assessment," at the request of a family affected by a safety plan, after 28 days. Plaintiffs characterize this proposal as "wholly inadequate," and have drafted their own eight-page Proposed Preliminary Injunction Order, which contemplates a detailed procedure for review of safety plans and for their termination.

This court stands by its determinations that DCFS's past practices with respect to safety plans raise due process and liberty interest concerns. The

court also stands by its conclusion that DCFS is entitled, in the first instance, to propose procedures that will address those concerns. In the court's view, the DCFS proposal is a good-faith attempt to address the issues reviewed in the court's March 9, 2005 opinion. Nor is the court prepared to assume, as Plaintiffs do, that the Safety Plan Team Assessment is nothing more than a "formalized and glorified" version of the Department's "constitutionally worthless" policy. (Plaintiffs' Submission in Accordance with the Court's March 11, 2005 Memorandum Opinion and Order, at 9.)

The court approves the DCFS proposal, with certain modifications, outlined below:

- The DCFS proposal now provides, on page 7 of the Department's May 11, 2005 submission, that "[t]he safety plan will contain a specific duration for the safety plan that will be identified either as a specific time period, or a specific event, i.e., completion of a victim sensitive interview." The court would add a statement to this effect; "If the plan will end with a specific event, the safety plan will explain in writing the steps necessary for that event to occur."

- The DCFS proposal requires the child welfare specialist to "monitor the safety plan every five working days and . . . reassess the safety of the child while monitoring the safety plan." The court would require, further, that the child welfare specialist make a brief notation, at each five-day review, of the reason(s) the safety plan should remain in effect. This requirement, in the court's view,

would serve as a reminder to the child welfare specialist that restrictions are expected to be temporary and limited. The court is concerned that a safety plan not come to be viewed as the "status quo," but does not share Plaintiffs' suspicion that "someone who is responsible for imposing the Safety Plan in the first place" (Plaintiffs' Submission, at 4) will not conscientiously consider whether the necessity for such a plan continues.

- The court endorses the DCFS proposal for a Safety Plan Team Assessment ("SPTA") review mechanism, with certain modifications. In prescribing these modifications, the court reminds the parties that this order regarding safety plan review relates only to those individuals who fall within the amended class definition described in the court's April 16, 2004 order. With respect to such class members, the court concludes that the 28-day waiting period before any review of a safety plan may well violate a family member's privacy or liberty interests. The court believes Plaintiffs' own proposal for review after just five days is unworkable, as well. The court is mindful, too, of the Department's consistent position that most (if not all) safety plans are in fact voluntary and will thus generate no request for review. Given the severity of the restrictions at issue under the amended class definition, the court believes the SPTA review mechanism should be available after ten working days, exclusive of weekends.

- Under the DCFS proposal, the Child Protection Manager convenes the SPTA review. The court recommends that the plan provide that, where practicable, on the request of the class member, a Child Protection Manager who has not been involved in the initial imposition of a safety plan conduct the review.

- Finally, the DCFS proposal calls for the Department to "draft a revised brochure and specific forms to be used during the SPTA process." The court directs, further, that the Department train its staff regarding this process and provide information concerning that process to class members at the time the safety plan is initiated.

With these modifications, the court adopts the Department's proposals as its order. The court directs the Department to implement these new procedures as soon as practicable, and expects that will be no later than 60 days after entry of this order. The court expects, further, to retain jurisdiction to enforce the terms of this order.

ENTER:

Dated: December 2, 2005

/s/ Rebecca R. Pallmeyer
REBECCA R. PALLMEYER
United States District Judge

United States District Court,
N.D. Illinois,
Eastern Division.

Belinda DUPUY, et al, Plaintiffs,

v.

Bryan SAMUELS, Director, Illinois Department of Children & Family Services, in his official capacity, Defendant.
No. 97 C 4199.

March 9, 2005.

MEMORANDUM OPINION AND ORDER

PALLMEYER, District Judge.

Plaintiffs represent a class of persons who challenge the constitutionality of certain policies and procedures of the Department of Children and Family Services ("DCFS" or the "Department") relating to the investigation of allegations of child abuse or neglect. In an earlier proceeding. Plaintiffs focused on the Department's procedures for determining whether reports of such abuse or neglect should be "indicated" or "unfounded." On March 30, 2001, the court granted Plaintiffs' motion for a preliminary injunction as to certain of these "core" and "special" DCFS policies. Specifically, the court found that "the relatively low standard of proof required to indicate a finding, combined with the indefensible delays" in the appeal process and the resulting "staggering expungement rate" of indicated reports, violated Plaintiffs' procedural due process rights. *Dupuy v. McDonald,* 141 F.Supp.2d 1090, 1136 (N.D.Ill.2001), *aff'd in part and rev'd in part by, Dupuy v. Samuels,* 397 F.3d 493 (7th Cir.2005). The

court noted, further, its suspicion that the agency's lengthy delays not only victimized persons who are innocent of abuse or neglect charges, but might also result in exoneration of persons who are guilty of such charges. 141 F.Supp.2d at 1130.

In this proceeding, Plaintiffs are challenging DCFS "safety plans," which impose restrictions upon families during the pendency of investigations into allegations of abuse or neglect. Plaintiffs claim that the safety plans are unconstitutional and seek further injunctive relief to prohibit DCFS from implementing the plans in any form. Resolution of this issue has been complicated the parties' contentious dispute as to the appropriate class definition. The court has now entered an order defining the class, for purposes of this stage of the litigation, as consisting generally of persons under investigation for child abuse or neglect who are the subject of "safety plans," imposed under threat, that prohibit or restrict their contacts with their children. *See* Order of 9/30/03 (amending class definition to include families subject to safety plans involving no contact requirements or removal from the home); Order of 4/16/04 (amending class definition to require a threat of protective custody and to exclude persons without a legal relationship to the children or spouse). For the reasons set forth below, Plaintiffs' second motion for preliminary injunction is granted in part and denied in part as described herein.

Background

The background facts, and a description of the DCFS procedures for investigating allegations of abuse and neglect, are more fully presented in this court's March 30, 2001 Memorandum Opinion and Order. *See Dupuy,* 141 F.Supp.2d at 1092-1130. This opinion assumes the reader's familiarity with the

earlier decision and will summarize those facts here only briefly.

I.

THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES

DCFS is the state agency charged by statute with the duty of investigating allegations of child abuse and neglect. *Dupuy,* 141 F.Supp.2d at 1092; 325 ILCS 5/2. The Department is organized into various operational divisions, including the Division of Child Protection ("DCP"). The DCP is responsible for operating a hotline to accept calls regarding allegations of child abuse and neglect (the "DCFS Hotline"), and for investigating those allegations. *Id.* at 1093. Of the more than 350,000 calls placed to the Hotline each year, 65,000 are investigated. Approximately 23,000 (or 1/3) of the investigations result in "indicated" findings, meaning that the investigator has determined that credible evidence of child abuse or neglect exists. The remaining charges are deemed "unfounded," meaning that the investigator has not found credible evidence of abuse or neglect. *Id.*

II.

THE ABUSE AND NEGLECT INVESTIGATIVE PROCESS

Any person may make a report of child abuse or neglect by calling the toll-free DCFS Hotline. Certain persons whose employment brings them into frequent contact with children are considered "mandated reporters" and, thus, are required by law to make a Hotline report if they have a reasonable belief that a child may be abused or neglected. *Id.* at 1094; (Ill. Admin. Code tit. 89, § 300.30). If a

Hotline call is deemed to be made in good faith and to meet the minimum criteria for further investigation, the Hotline operator completes a Child Abuse and Neglect Tracking System form (the "CANTS 1" form) and submits it to a local DCP office where an investigator is assigned. The investigator is responsible for conducting the investigation and for making a final determination as to whether to "indicate" or "unfound" the report. *Id.* at 1095.

The regulations explain that "[w]hen the investigative worker has completed all required investigative contacts and has secured appropriate physical evidence ... the investigative worker shall make a finding of Indicated or Unfounded. This determination shall be based upon whether the information gathered during the investigation and from the direct observations made by the investigative worker constitutes credible evidence of child abuse or neglect." (Ill. Admin. Code tit. 89, § 300.110(i)). An investigator's recommended determination is reviewed by his or her supervisor who has the actual authority to "indicate" or "unfound" the investigation. *Dupuy,* 141 F.Supp.2d at 1097. Once the recommended finding has been approved, the investigator completes a CANTS 2 Final Finding Report form and forwards it to the State Central Register ("SCR"), where it is registered in a computerized listing of information regarding allegations of abuse or neglect. *Id.* at 1093, 1098. DCFS regulations require that an investigation be completed within 60 days, though this time period may be extended for periods of up to 30 days upon a showing of good cause. (Ill. Admin. Code tit. 89, § 300.110(i)(3)(C)). Evidence at the first preliminary injunction established, however, that in actual practice, investigations often took far longer. *See Dupuy,* 141 F.Supp.2d at 1106-1130.

III.

SAFETY PLANS

In conjunction with investigations into child abuse and neglect, DCFS utilizes a variety of plans aimed at protecting children pending the outcome of an investigation and/or after a report has been indicated. One such plan is the Child Endangerment Risk Assessment Protocol ("CERAP") "safety plan." CERAP was developed in response to several high profile incidents in the early 1990s where children were seriously injured or killed shortly after DCFS became involved in their cases. (Tr. 2243-44.) In 1994, the Illinois legislature enacted Public Act 88-614, which required DCFS to develop and implement:

> (1) A standardized child endangerment risk assessment protocol.
>
> (2) Related training procedures.
>
> (3) A standardized method for demonstration of proficiency in application of the protocol.
>
> (4) An evaluation of the reliability and validity of the protocol.

20 ILCS 505/21(e). In response to this legislation, DCFS formed a multidisciplinary committee of external experts to oversee the development of the CERAP process, which is now set forth in Appendix G to Department Rule and Procedure 300, and in the Safety Determination Form, the Safety Plan form, and the Safety Plan Termination Agreement. (*See* Jt. Ex. 7, Appendix G; Jt. Ex. 5(c), CFS 1441-A; Jt. Ex. 5(e), CFS 1441; Jt. Ex. 5(f), CFS 1441-B).

A. The Safety Plan Assessment Process

The CERAP process is designed to "provide workers with a mechanism for quickly assessing the potential for moderate to severe harm immediately or in the near future and for taking quick action to protect children." (Jt. Ex. 7, Appendix G, at 1.) A CERAP form must be completed for all children in the home of an alleged perpetrator within 48 hours of DCFS's receipt of a Hotline call, and within 24 hours after a child protection specialist sees the alleged child victim(s). (*Id.* at 3; Jt. Ex. 2, Procedures, § 300.50(c).) The CERAP process requires the child protection specialist to assess whether a child is safe or unsafe, using a four-step analysis: (1) does the case present any one or more of 15 enumerated "safety factors"; (2) how does that factor relate to specific individuals; (3) are there any "family strengths and mitigating circumstances"; and (4) would the child be "safe" or "unsafe" absent implementation of a safety plan. (Jt. Ex. 7, Appendix G, at 7-15.)

1. The 15 Enumerated Safety Factors

The first step in the CERAP process is for the child protection specialist to determine whether one of 15 enumerated safety factors is present. The factors include: a household member's behavior is violent and out of control; the caretaker has not, will not, or is unable to provide sufficient supervision to protect the child from harm; the child is fearful of people living in or frequenting the home; child sexual abuse is suspected and circumstances suggest that the child's safety may be an immediate concern; and a paramour is the alleged or indicated perpetrator of physical abuse. There is also a general "other" category to cover safety concerns not expressly

listed.[1] The Regulations provide several examples of factors that may fall under the "other" category,

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[1] The complete list of factors is as follows:
1. Any member of the household's behavior is violent and out of control.
2. Any member of the household describes or acts toward child in predominantly negative terms or has extremely unrealistic expectations. 3. There is reasonable cause to suspect that a member of the household caused moderate to severe harm or has made a plausible threat of moderate to severe harm to the child.
4. There is reason to believe that the family is about to flee or refuse access to the child, and/or the child's whereabouts cannot be ascertained.
5. Caretaker has not, will not, or is unable to provide sufficient supervision to protect child from potentially moderate to severe harm.
6. Caretaker has not, or is unable to meet the child's medical care needs that may result in moderate to severe health care problems if left unattended.
7. Any member of the household has previously or may have previously abused or neglected a child, and the severity of the maltreatment, or the caretaker's or other adult's response to the prior incident, suggests that child safety may be an urgent and immediate concern.
8. Child is fearful of people living in or frequenting the home.
9. Caretaker has not, or is unable to meet the child's immediate needs for food, clothing, and/or shelter; the child's physical living conditions are hazardous and may cause moderate to severe harm.
10. Child sexual abuse is suspected and circumstances suggest that the child['s] safety may be an immediate concern.
11. Any member of the household's alleged or observed drug or alcohol abuse may seriously affect his/her ability to supervise, protect, or care for the child.
12. Any member of the household's alleged or observed physical/mental illness or developmental disability may seriously affect his/her ability to supervise, protect or care for the child.
13. The presence of domestic violence which affects caretaker's ability to care for and/or protect child from imminent, moderate to severe harm.
14. A paramour is the alleged or indicated perpetrator of physical abuse.
15. Other (specify).
(Jt.Ex. 5(e), CFS 1441.)

including that a child's behavior is likely to provoke the caretaker to harm the child; that persons in the household have unexplained injuries; or that the caretaker refuses to cooperate or is evasive. (Jt.Ex. 5(e), CFS 1441; Jt. Ex. 7, Appendix G, at 12.) If the investigator determines that there is "clear evidence or other cause for concern" that a factor is present, he must check the factor "yes" on the CERAP Safety Determination Form (CFS 1441); otherwise, he must check the factor "no." (*Id.*)

DCFS Procedures do not define what constitutes "other cause for concern." John Goad, former Deputy Director of the Department's Division of Child Protection, testified that the investigator is expected to look for "a reasonably extreme version" of a listed safety factor, and must determine a factor's existence using all of the information available from the initial report and the person who made it, as well as any additional information that may be obtained by observing and talking with the children and the family, and by observing the home environment. (Tr. 2259, 2263-64.) It appears that in practice, however, investigators do not always require a "reasonably extreme" showing and that any amount of evidence may be sufficient warrant for the investigator to check a safety factor "yes." Deputy Director Goad conceded, for example, that investigators need neither a certain "level of evidence" nor evidence confirming that it is "more likely than not" that a safety factor is present in order to check a factor "yes." (PX L, Goad Dep., at 27-28.)

Plaintiffs find this low standard significant, particularly because several factors by their terms require only allegations of wrongdoing and/or minimal evidence of any risk of harm to the child. Factors 11, 12, and 14, for example, direct investigators to check "yes" based solely on an allegation of abuse or neglect, even if no

investigation has yet occurred or if an investigation suggests that the allegation may be untrue. (*See, e.g.*, Jt. Ex. 5(e), CFS 1441, factor 14) ("[a] paramour is the *alleged* or indicated perpetrator of physical abuse") (emphasis added); Tr. 200-01. Factors 2, 8, and 14 direct investigators to check "yes" even if there is no or only nominal evidence that the presence of the factor poses any danger of harm to a child. (*See, e.g., id.*, factor 8) ("[c]hild is fearful of people living in or frequenting the home"; no requirement of evidence that the child be in actual danger from those people). In addition, nine of the factors (1, 2, 3, 7, 8, 10, 11, 12, and 14) do not require any evidence that a parent or caretaker (as opposed to some other "member of the household") has engaged in any wrongful conduct. Factor 3, for example, states that "[t]here is reasonable cause to suspect that a member of the household caused moderate to severe harm or has made a plausible threat of moderate to severe harm to the child." (Jt.Ex. 5(e), CFS 1441.) This test is met, presumably, even where there is no evidence that the parent or caretaker is unable to ensure the safety and supervision of his or her children.

For each factor checked "yes," the investigator is expected to explain what led to that determination. (Jt. Ex. 7, Appendix G, at 12; Tr. 2265-66.) DCFS Procedures explain, further, that "[t]he presence of any one of the listed behaviors and/or injuries does not in and of itself mean that a child should be determined to be unsafe." (*Id.* at 8.) Rather, an investigator must also consider (1) the age and developmental status of the child; (2) the mental, medical, and/or developmental status of the parent(s) or other person(s) responsible for the child's safety (i.e., are they capable of and willing to protect the child's safety?); (3) the type, severity, location, and/or extent of injury to a child; and (4) the intent,

severity and/or duration of the behaviors directed toward the child. (*Id.*)

If an investigator does not check any safety factors "yes," the CERAP process is completed without the need for further action. If, on the other hand, the investigator determines that any one of the 15 safety factors is present and checks that box "yes," then he or she must proceed to the next step of the process.

2. Family Strengths and Mitigating Circumstances

At the next step of the CERAP process, the investigator is required to "describe any family strengths or mitigating circumstances which may serve to manage or control the safety factors." (Jt. Ex. 7, Appendix G, at 13.) DCFS Procedures recognize that "[s]ometimes the presence of a safety factor can be partially or fully controlled or eliminated by a family strength or mitigating circumstance." (*Id.*) According to Appendix G, "[r]egular contact with a support person who can assure the safety of the child" is one example of such a family strength or mitigating circumstance. (*Id.*) Deputy Director Goad offered the additional example of a husband's "credibl[e]" assurance that he will remove from the home a "violent and out of control" mother who is "physically small" until she "calm[s] down." (Goad Dep., at 55-56.) DCFS Procedures do not otherwise provide any guidance for determining either the presence of relevant family strengths or mitigating circumstances, or the proper method of balancing them against the cited safety factor(s).

The August 13, 2002 amendments to Appendix G provide that "[f]or the purpose of safety assessment, a protective effort must be made on the family's initiative and not as the result of the worker's suggestion in order for it to constitute mitigation."

(Jt. Ex. 7, Appendix G, at 13.) By way of example, the amendments state that in a domestic violence situation, "if the worker initiates the mother's move to [a] shelter, it is the worker's and not the mother's capacity that has controlled the safety threat [so] the child is considered unsafe and the move to the shelter is considered a safety plan." (*Id.*) *See infra* pp. 10-20 for a discussion of safety plans. In other words, a protective measure will not constitute a mitigating circumstance unless the caretaker proposes it without any prompting from a DCFS representative.

Deputy Director Goad testified that there are "probably" potential mitigating factors as to every safety factor, but of the documentation supporting imposition of a safety plan in the 92 sample cases in this litigation, 64 (or 69%) did not identify any family strengths or mitigating circumstances. (Goad Dep., at 56-57; Tr. 2667.)

3. The "Safe" or "Unsafe" Determination

If an investigator determines that a safety factor is present but controlled by a family strength or mitigating circumstance, the child must be deemed "safe," meaning that "[t]here are no children likely to be in immediate danger of moderate to severe harm at this time" and no safety plan is necessary. (Jt.Ex. 5(e), CFS 1441.) If, however, the investigator determines that a safety factor is not controlled by a family strength or mitigating circumstance, the child must be deemed "unsafe," meaning that "[a] safety plan must be developed and implemented or one or more children must be removed from the home because without the plan they are likely to be in immediate danger of moderate to severe harm." (Jt.Ex. 5(e), CFS 1441) (emphasis in original). As noted, a determination of "unsafe" may be made based on the presence of only one safety factor, some

of which require no or only nominal evidence that a child is in danger of harm. In addition, because investigators must complete the CERAP analysis for all children in the home of an alleged perpetrator, children who are not alleged victims of abuse or neglect are nonetheless commonly subject to safety plans. (Jt. Ex. 7, Appendix G, at 5.)

B. Creation of Safety Plans

Once an investigator finds that a child is "unsafe," the next step is to develop a "safety plan." Deputy Director Goad estimated that as many as 10% of investigations result in safety plans, which translates into as many as 10,000 plans per year. (Tr. 2300-01.) Safety plans are intended to be collaborative efforts between the investigator and the family. According to Deputy Director Goad, the investigator generally talks to the family about the problem that led to the "unsafe" determination and asks family members to suggest possible steps for assuring the safety of the child. (Tr. 2302.) Goad explained that the investigator is then expected to discuss the family's ideas for a safety plan in an effort to work out mutually-agreeable terms. (Tr. 2302-03.) The evidence offered by Plaintiffs suggests, however, that in practice, investigators often make little effort to collaborate with families in implementing safety plans. Nearly every class member witness who signed a safety plan testified that the investigator simply presented a proposed plan for his/her signature with little or no discussion of the plan terms or alternatives. (Tr. 346, 470-71, 556, 562, 715, 719, 795-98, 1165-66, 1304, 1379.)

1. Plan Terms

An effective safety plan includes measures designed to control the safety factors that led to the need for a safety plan; is as minimally disruptive to the family

as possible; minimizes any separation issues for family members; and relies on resources that are "immediately and realistically available" to the family. (Tr. 2283 (Goad).) The safety plan must be recorded on the Safety Plan Form (CFS 1441-A) and must include a written description of "what will be done or what actions will be taken to protect the child(ren), who will be responsible for implementing the components of the safety plan and how/who will monitor the safety plan." (Jt. Ex. 7, Appendix G, at 15.) In addition, "[e]very safety plan must specify the conditions under which the plan is to be terminated and an estimated time frame within which this can be expected to occur." (*Id.* at 14.) The plan must "contain a time frame for implementation and continued monitoring and a contingency plan if the primary safety plan is no longer needed." (*Id.*)

The terms of a safety plan vary depending on the particular case. The plans signed by class members in this case either (1) separated children from their parents, guardians, or other close relatives by removing one or more such individuals from the home, or by imposing no-contact requirements preventing children from having any contact with parents, guardians, or other close relatives; or (2) allowed children and family members to have only supervised contact with each other. Class members are individuals who signed these plans under threat that their children would otherwise be taken into protective custody. *See* Order of 4/16/04 (setting forth revised class definition).

Deputy Director Goad issued a directive on March 22, 2002 requiring that "all safety plans in which family members (children or adults) are relocated from their residence must be approved by the respective Child Protection or Field Service Manager." (DCFS Inter-Office Correspondence Regarding Safety Plans dated 3/22/02.) To approve

such a plan, the manager must consider (1) whether the child is genuinely unsafe; (2) whether the plan will adequately protect the child(ren) in a manner that is minimally disruptive to all family members; and (3) whether there is a reasonable and timely potential resolution to the plan. (*Id.*) Upon approving a safety plan that relocates a family member, the manager is directed to "track them" (presumably, the plan itself or family members subject to it) to "assure the timely and appropriate resolution of the safety plan according to the directions in Appendix G of Procedure 300." (*Id.*)

2. Agreement to a Safety Plan

DCFS views all safety plans as voluntary agreements between the Department and the family. Indeed, the child's primary caregiver and, if different, the person(s) most responsible for carrying out the plan must sign the safety plan form, which states that the person has "discussed the safety plan with the investigator/worker, ... understand[s] its contents and that it is voluntary, and agree[s] to abide by the terms and conditions of the plan." (Jt.Ex. 5(c), CFS 1441-A.) The investigator must also sign the form attesting that he or she has "discussed the attached Safety Plan and the consequences of non-compliance with the caretaker and all those who are responsible for carrying out the plan" and that he or she has agreed to "abide by the terms and conditions of the plan." (*Id.*) The form provides contact numbers for both the investigator and his or her supervisor (who must approve the plan) in case a family member wants to communicate with the Department. (Tr. 2287-89.)

August 13, 2002 amendments to Appendix G reinforce the requirement that an investigator must inform a family that safety plans are voluntary:

> The worker who is responsible for implementing the plan must inform the family that their cooperation with the plan is voluntary and--to the extent safely possible--must enlist the family's participation in the development of the plan. When the plan is developed the worker must explain it to the family and must provide the family with information about the potential consequences if the plan is refused or violated. If the family refuses to accept the plan or if the plan is violated, the worker must reassess the situation, consider protective custody and/or referral to the State's Attorney's Office for a court order.

(Jt. Ex. 7, Appendix G, at 14.) The amendments also require investigators to notify all parents or caretakers when a safety plan ends. (*Id.* at 16.)

Notwithstanding these regulatory provisions, Plaintiffs insist that safety plans are coercive. They note that a stated consequence of rejecting the plan or failing to comply with it is the removal of the children from the home. The signature page of the safety plan form expressly states that "[w]e understand that failure to agree to the plan or to carry out the plan may result in a reassessment of my home and possible protective custody and/or referral to the State's Attorney's Office for a court order to remove my children from my home. I will then have the opportunity to plead my case in court." (Jt.Ex. 5(c), CFS 1441-A.) Most class member witnesses testified that in addition to this written warning, investigators verbally threatened them with removal of their children if they refused to agree to a safety plan. (Tr. 347-49, 392-93, 470-71, 556, 562, 715, 719, 795-98, 1165-66, 1304, 1379.) Faced with this admittedly "tough decision," virtually every parent or caretaker confronted with a safety plan ends up signing it. (Tr. 2311-12 (Goad);

Def. Resp., at 12.)[2] All families do, however, have the option of rejecting the plan.

DCFS procedures require investigators to give the family a copy of their safety plan form, which sets forth the restrictions imposed. There is no requirement, however, that families receive a copy of the CERAP Safety Determination Form, which details the underlying basis for the safety plan as reflected in the investigator's assessment of the 15 safety factors. (Tr. 2290 (Goad) (though giving a CERAP form to families is not prohibited, "there is no policy that guides workers to give it to them either").) There is no evidence that investigators or supervisors have ever given the CERAP form to family members, and none of the plaintiff witnesses in this case ever received one. In Plaintiffs' view, "the resulting [safety plan] agreements are ones in which one of the parties (DCFS) has virtually all the information (*i.e.*, about why the child is considered 'unsafe' and therefore requires a safety plan), and the other party (the 'agreeing' family member) has none." (Pl. Mem., at 20.)[3]

Plaintiffs find this objectionable in part because the safety plan form does not explain the legal standards and procedures DCFS must follow in order to remove a child from the home. *See* Abused and Neglected Child Reporting Act, 325 ILCS 5/5; Juvenile Court Act, 705 ILCS 405/2-7(1), 405/2-8, 405/2-9. Nor is there any explanation as to the type of evidence required to obtain protective or temporary custody of a child. *See infra* pp. 18-20. In addition, the

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[2] Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for a Second Preliminary Injunction is cited as "Def. Resp., at __."

[3] Plaintiffs' Post-Trial Memorandum in Support of their Amended Motion for a Second Preliminary Injunction is cited as "Pl. Mem., at __."

language of the safety plan forms implies that DCFS has gathered sufficient information to take custody of a child at the time the safety plan is implemented. (*See* Jt. Ex. 5(c), CFS 1441-A) ("[s]afety plans are to be developed only where a decision of 'unsafe' has been made and workers, with supervisory approval, assess that without the plan the child(ren) must be removed from the home"). Plaintiffs claim that, in reality, such evidence is not required in order to find a child "unsafe" pursuant to the CERAP process. DCFS Child Protection Manager Anne Gold, moreover, acknowledged at the trial that "for the cases that end up getting unfounded in [her] office, the likelihood that [DCFS] would have grounds for protective custody on the first day of the investigation is about zero." (Tr. 2982.)

Plaintiffs also question the voluntariness of safety plans that may be implemented before an investigator has spoken with the alleged perpetrator. For example, though safety plans are generally implemented within 48 hours of a Hotline call, DCFS regulations allow for a delay of up to "7 calendar days of the receipt of the report" before the investigator is required to contact an alleged perpetrator who is "different from the parents or caretakers." (Jt. Ex. 2, Procedures § 300.50(c)(6).) In addition, DCFS Procedures require investigators to notify, and defer to law enforcement authorities in certain types of cases, such as those involving allegations of serious physical or sexual abuse. (*Id.* § 300.70; Tr. 2218-19.) If the police ask DCFS investigators not to speak with an alleged perpetrator, investigators normally honor the request but, if possible, construct safety plans even without such contact. (Goad Dep., at 174; Tr. 2697 (Goad).) In some cases, moreover, mere action in conformity with a DCFS request may be deemed an "agreement" to a safety plan. Deputy Director Goad testified, for example, that if an allegedly abusive

father leaves the home on his own accord, "it certainly meets the standard that we would need to meet in order to consider that an adequate plan for the child's safety." (Goad Dep., at 163-64.) (*See also* Tr. 2692 ("[t]here are circumstances where ... it may be impossible ... for the Department to obtain ... express agreement to the plan").)

3. Duration of Safety Plans

Safety plans are intended to be temporary, "usually short-term measures" to control serious and immediate threats to a child's safety. (Jt. Ex. 7, Appendix G, at 14; Tr. 2277 (Goad).) The August 13, 2002 amendments to Appendix G provide that safety plans must be reassessed "every five working days following the determination that any child in a family is unsafe." (Jt. Ex. 7, Appendix G, at 4) (emphasis in original.) The assessment

> must continue until either all children are assessed as being safe or all unsafe children are removed from the legal custody of their parent/caretakers. This assessment should be conducted considering the child's safety status as if there was [sic] no safety plan (i.e., Would the child be safe WITHOUT the safety plan?).

(*Id.*) (emphasis in original). The amendments also instruct that safety plans "must be adequate to assure the child's safety but as minimally disruptive to the child and family as is reasonably possible." (*Id.* at 13.) In addition, "[e]very safety plan must specify the conditions under which the plan is to be terminated and an estimated time frame within which this can be expected to occur." (*Id.*)

DCFS does not keep statistical data showing the actual duration of safety plans. (Tr. 2324 (Goad).) A review of the 92 safety plans in the representative

sample cases (which were imposed prior to the 2002 Amendments to DCFS Appendix G) reveals that many plans have indefinite time frames, or fail to state any duration at all. By Plaintiffs' estimation, 31 plans (33.3%) were indefinite in length. (*See, e.g.*, SAI 8, at 28502) (alleged victim's stepfather will move out and have "no contact" with stepdaughter "during the course of this investigation"); SAI 92, at 36157, 36159 (alleged victim's half-brother will move out of the house and have "no unsupervised contact" with his half-sister; plan scheduled to terminate "at the discretion of treatment professional"); SAU 20, at 39869 (mother will not allow daughter "to return to father [a non-household member] until everything is cleared up as to what happened"); SAU 40, at 41317 (alleged victim is not to share a bedroom with his alleged perpetrator brother; the two siblings "must be supervised at all times by a parent until this investigation is complete"; plan termination date is "undetermined at this time").

Plaintiffs further estimate that 53 plans (57%) did not set forth any duration at all. (*See, e.g.*, SAI 34, at 31134 (mother will not allow son (the alleged perpetrator) to have "any contact" with his sister (the alleged victim) and he is not allowed to return home upon release from police custody; duration unspecified); SAI 81, at 35384 (alleged victim not allowed to have "any contact" with her half-brother "at any time"; duration unspecified); SAI 98, at 36690 (father of alleged victim "agreed to leave the residence"; duration unspecified).) In addition, of the 40 safety plans with stated durations of definite length, only one (.025%) was shorter than five days, and six others (20%) were longer than 20 days. (*See, e.g.*, SAI 49, at 32708 (if alleged perpetrator not detained by police, mother will not allow him to return to the house "pending outcome of this investigation"; estimated plan duration, "2--3 months"); SAU 24, at 40137 (father not allowed

visitation rights with his daughter "until such time as it is determined that it is safe to have them continue"; plan to be in effect for "at least 60 days").)

Defendant argues that many of the plans chosen by Plaintiffs as representative "are not safety plans at all." (Def. Resp., at 51.) For example, one file included a safety plan requiring no contact between the alleged perpetrator and victim (whose relationship to each other is unclear though they share a last name), but the plan was implemented after the alleged perpetrator had been arrested and taken to jail, and after a court had already imposed a bond order with the same restriction. (*See* SAI 21, at 29793 ("no time frame c[ould] be imposed as court intervention is necessary"); Tr. 1769.) In another file, similarly, there was a safety plan requiring no contact between the alleged victim, who lived with her aunt, and the alleged perpetrator, the aunt's husband, but Defendant says the plan was unnecessary because the perpetrator was arrested and in jail. (SAI 62, at 33872; Tr.1959; Def. Resp., at 53.) (*See also* Def. Resp., at 52-54.) In still other files, DCFS implemented sexually aggressive children and youth ("SACY") plans which are "used in cases where the child who is the subject of the plan is in foster care, and the child's guardian is the DCFS Guardianship Administrator." (Def. Resp., at 51.) (*See* SAU 2, at 38821.) Several additional files, moreover, did not involve class members. (*See, e.g.*, SAI 12, at 28932 (alleged perpetrator is daughter of woman running an unlicensed day-care service out of her home; alleged victims are children who attended day-care at the home); SAI 38, at 31618 (alleged perpetrator is mother's "live in boyfriend"); SAI 70, at 34522 (alleged perpetrator is mother's paramour).)

Even assuming some of the 92 safety plans are not technically viewed as such by DCFS, it is undisputed that at least some plans are in place throughout the

course of an investigation, regardless how long that may take, and that others fail to specify any duration. Indeed, Deputy Director Goad himself testified that many safety plans last at least as long as the underlying investigation into the alleged child abuse or neglect, and that even when a report is "unfounded," a safety plan may remain in effect (presumably in accordance with its stated terms) if there are "safety issues that would make continuation of a safety plan appropriate." (Tr. 2754 (Goad).) Prior to the August 2002 amendments, moreover, DCFS did not have any procedure requiring that families be notified when a plan had been lifted. (Jt. Ex. 7, Appendix G, at 16.)

4. Contesting Safety Plans

Once DCFS has implemented a safety plan, family members subject to the plan may ask that it be modified, or an investigator may initiate modification on his or her own. (Goad Dep., at 253-55, 259-60.) There is no formal procedure for requesting a modification, however, nor is an investigator obligated to respond to, or act upon such a request. (*Id.* at 259-60.) In addition, DCFS has no procedure authorizing those subject to a safety plan to contest it in any way, nor does DCFS advise family members that agreeing to the plan may result in a waiver of their right to contest it. (*Id.* at 227, 259; Tr. 2722 (Goad).)

5. Alternatives to Safety Plans

As noted, a family's failure to agree to a safety plan may result in the children being removed from the home. There are two ways this may occur: (1) DCFS may take protective custody of a child pursuant to the Abused and Neglected Child Reporting Act ("ANCRA"), 325 ILCS 5/5, and the Juvenile Court Act ("JCA"), 705 ILCS 405/2-7(1), 405/2-8, 405/2-9

(discussing "temporary protective custody"); or (2) DCFS may obtain a court order granting it "temporary custody" of a child pursuant to the JCA. To take a child into protective custody without court authorization, DCFS must determine that it: "(1) ... has reason to believe that the child cannot be cared for at home or in the custody of the person responsible for the child's welfare without endangering the child's health or safety; and (2) there is not time to apply for a court order under the Juvenile Court Act of 1987 for temporary custody of the child." 325 ILCS 5/5.

After taking protective custody of a child, DCFS must "promptly initiate proceedings under the Juvenile Court Act of 1987 for the continued temporary custody of the child." *Id.* Under the JCA, moreover, "a minor ... taken into temporary protective custody must be brought before a judicial officer within 48 hours, exclusive of Saturdays, Sundays, and court-designated holidays, for a temporary custody hearing to determine whether he shall be further held in custody." 705 ILCS 405/2-9(1). If there is no temporary custody hearing within the prescribed time limitations, protective custody lapses and the child must be returned to his or her home. 705 ILCS 405/2-9(3). Except in emergencies, DCFS Procedures require prior supervisory or management authorization to take a child into protective custody. (Jt. Ex. 2, Procedures § 300.80(f).)

To obtain a temporary custody order, DCFS must file a petition for adjudication of wardship with the State's Attorney in the county in which the child lives. (Tr. 232, 242 (Maganzini).) No such petition may be filed, however, unless the State's Attorney "screens" the case into juvenile court (i.e., accepts the case). (Tr. 232-33.) In Cook County, Illinois, the State's Attorney will not screen a case into court

absent evidence that would, in the view of the attorney screening the case, support a judicial determination that the child should be taken into temporary custody. (Tr. 224, 241, 244.) Such evidence consists of "probable cause to believe that [a child] is abused, neglected or dependent"; that "it is a matter of immediate and urgent necessity for the safety and protection of [the child]" that he be removed from his or her parents' care; and that the state has made "reasonable efforts ... to prevent or eliminate the necessity of removal of [the child] from his or her home, [unless] no efforts reasonably could be made to prevent or eliminate the necessity of removal." 705 ILCS 405/2-10.

If the State's Attorney finds insufficient evidence to screen a case into court, no petition for adjudication of wardship will be filed at that time. Instead, the State's Attorney will issue a form entitled "Ongoing Investigation," which provides the investigator with specific due dates for updating the State's Attorney about the case and/or bringing it back for further screening review. The Assistant State's Attorney completing the form may also instruct the investigator to implement or maintain a safety plan or a "care plan" while the additional information is being gathered. (*See, e.g.*, Ex. E to Defendant's Additional Declarations and Exhibits) ("Def.Supp.") Defendant claims that "care plans" are the same as "safety plans," citing the declaration of Debra Dyer, DCFS's Chief Deputy General Counsel in the Office of Legal Services. (Ex. D to Def. Supp., ¶ 5 (noting that in approximately 40 investigations between December 2003 and October 2004, the State's Attorney decided not to file a petition but requested that DCFS "implement or continue a safety or care plan").) Plaintiffs dispute that safety plans are the same as care plans, but only one of the four sample Ongoing Investigation forms submitted by Defendant mentions a care plan as opposed to a safety plan.

That case involved a parent attending a substance abuse treatment program. (Plaintiffs' Response to Defendant's Supplementation of the Record, ¶ 3; Ex. E to Def. Supp.) In any event, neither party disputes that the State's Attorney has an "open door policy" on re-reviewing cases. (Tr. 250 (Maganzini).)

A third alternative to safety plans is a juvenile court order requiring cooperation with conditions, short of removing the child from the home, that the court deems necessary for the safety of the child (" § 2-25 Orders"). 705 ILCS 405/2-25. To secure a § 2-25 Order, DCFS must first file a petition for adjudication of wardship with the State's Attorney to initiate a juvenile court case. 705 ILCS 405/2-13. The court must find probable cause to believe that the child is abused or neglected, at which point the court has broad authority to enter orders requiring parents or responsible caregivers to take various steps to protect the child from harm. 705 ILCS 405/2-10(1), 405/2-25. For example, a § 2-25 Order may require parents to attend therapy or participate in other services; or forbid persons who are allegedly endangering the child, including parents and caregivers, from having any contact or unrestricted contact with the child.

Finally, although the parties do not address the matter in their briefs, the court notes Plaintiffs' suggestion, at the hearing, that DCFS has an obligation to provide supportive services, including counseling or referrals to therapy, for parents and children in need of such services. Presumably services such as these might eliminate the need for restrictive conditions and thus constitute a fourth alternative to the imposition of safety plans.

IV.

EXAMPLES OF THE SAFETY PLAN PROCESS

The court's hearing on Plaintiffs' second motion for preliminary injunction spanned 22 days between September 4, 2002 and January 17, 2003, and generated 3,357 pages of transcript. The following is a summary of several investigations presented at the hearing which involved the implementation of safety plans.

A. James and Susan Redlin

On June 21, 2002, DCFS investigator Patrick Homa was assigned to investigate an allegation that James Redlin was inappropriately touching his son on a Chicago Metra Railroad train. (Tr. 2336.) Specifically, another passenger on the train told Metra police that James had touched his son's groin area; that the son had put his head in his father's lap and rubbed his father's groin area while the father kissed the back of his neck; and that the father had stated, "Oh, I guess you don't want to be tickled." (PX C, at 71003, 71011.) According to James, he was following a doctor's advice to engage in interactive touching and speech with his son, who suffers from mild autism. (Tr. 688, 690-91, 698-99.)

Homa first contacted the reporter--a Metra police official--for details about the incident, and also attempted (unsuccessfully) to contact the passenger who had witnessed the inappropriate contact. (Tr. 2337-39, 2375-76.) He then went to the Redlin home to see the alleged victim. (Tr. 2339.) Upon arriving at the home, Homa introduced himself to James and his wife Susan, advised them of the allegations against James, and gave them the Notification of a Report of Suspected Child Abuse and/or Neglect (the "CANTS 8 form") explaining the investigative

process. (Tr. 2339-40, 2342.) Approximately 15 minutes into the interview, James requested an opportunity to consult with legal counsel. (Tr. 2341.) At that time, Homa brought up the issue of a safety plan but, after the Redlins accused him of being rude, he left the home with the understanding that he would call the Redlins later that day after they had had a chance to speak with an attorney. (Tr. 2343-44, 2368.) Though Homa had observed the Redlins' son during the interview, he did not speak with him at that time because he wanted to "set up an interview at the [Lake County] Children's Advocacy Center." (Tr. 2342-43.)

Homa called Susan around noon to let her know that he would call back with a safety plan that afternoon. (Tr. 795.) At 4:00 p.m., Homa spoke with Susan by telephone about the safety plan, which required that James not act as an independent caretaker for his son or for any other children until the case was resolved, but which did allow him supervised contact with his son. (Tr. 2345, 2359, 2372, 2460.) Susan agreed to the plan even though it effectively left the family "prisoners" in their own home because Susan, the person responsible under the terms of the plan for supervising the son, is confined to a wheelchair. (Tr. 755, 812-13.) Homa delivered a copy of the safety plan to Susan on June 22, 2000. (Tr. 797, 818-19.) The same day, the Redlins retained the law firm of Lehrer & Redleaf (counsel for Plaintiffs in this case) to represent them during the investigation. (Tr. 742, 758.)

The investigation proceeded slowly in part because the Redlins were resistant to their son being interviewed given his mild autism. (Tr. 733-34.) Between June 21 and August 16, 2000, DCFS attempted unsuccessfully to obtain permission from the Redlins to interview their son at the Lake County Children's Advocacy Center. On at least one

occasion, Homa and his supervisor went to the Redlin home to discuss the matter accompanied by a Lake County deputy sheriff, but the Redlins refused to let their son be interviewed. (Tr. 731-32.) Finally on August 16, 2000, Homa's supervisor sent a letter to the Redlins' attorney stating that the Division of Child Protection was recommending that the allegation against James be unfounded. (Tr. 2351; PX C, at 71014 (Worker Activity Summary dated 8/12/00, noting "no credible evidence to substantiate the alleged allegation; involved youth due to medical reason unable to be interviewed as a credible witness as described by medical professional"); PX C, at 71109.)[4] Nevertheless, the Redlins' attorneys advised them to continue following the safety plan until they received official notification that the plan was unfounded. (Tr. 746-47.) The State Central Register advised the Redlins on September 26, 2000 that it had unfounded the report. (PX C, at 71000.)

B. Theresa C.

Theresa C. ran a day care center at her home. On April 3, 2001, Dillon, a child who attended the day care center, fell and suffered a depressed skull fracture while in Theresa's basement, and was taken for emergency surgery at Carl Hospital in Champaign, Illinois. On April 5, 2001, DCFS investigator Lee Boedigheimer was assigned to investigate the incident. (Tr. 591, 2468.) The next day, Boedigheimer spoke with Dr. Powell, the attending physician who saw Dillon at the hospital. Dr. Powell told Boedigheimer that Dillon had

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[4] The court is uncertain why this recommendation was made, but speculates that perhaps the Metra passenger who witnessed the alleged inappropriate touching did not cooperate further with the investigation. It is at least curious that the Redlins' refusal to submit their son for an interview should militate in favor of dismissal of the charges.

undergone surgery to relieve the pressure on his brain, to remove some blood clots, and to repair the fracture. (Tr. 2469-70.) Dr. Powell also stated that the explanation Theresa had given for Dillon's injury when she brought him to the hospital--that he had fallen while pulling himself up on a "Diaper Genie"--was highly unlikely, though not 100 percent impossible. (Tr. 2470-71.)

Also on April 6, 2001, Boedigheimer went to Dillon's home and observed that the entire left side of Dillon's face was swollen and that he had a three-inch incision on the top of his head running down behind his ear. (Tr. 2471- 72.) Shortly thereafter around 11:50 a.m., Boedigheimer went to Theresa's home along with Detective Roberts of the Pontiac Police Department. (Tr. 2472.) Theresa reiterated that Dillon had fallen while trying to climb up on a Diaper Genie while she was changing her own daughter's diaper. (Tr. 2473.) As part of the interview, Boedigheimer looked at the basement where the injury had occurred and noted a thin layer of carpeting over a cement floor. He also observed 13 or 14 children in the home, many of them under the age of two, which he believed was a violation of DCFS licensing standards for day care homes. (Tr. 2473-74.) Boedigheimer asked Theresa about the possibility of suspending her day care activities pending an investigation into Dillon's injury. Theresa stated that she had a vacation planned in any event so the hiatus would not be a problem. (Tr. 2472-74.)

Boedigheimer went back to his office and worked with his supervisor to create some safety plan options to present to Theresa later that afternoon. When Boedigheimer returned to Theresa's home, he gave her a CANTS 8 letter and told her that the reporting doctor (Dr. Powell) did not believe Dillon's injury matched her explanation for it. (Tr. 593,

2481.) Boedigheimer expressed some safety concerns for Theresa's own child, who was Dillon's age, and discussed implementing a safety plan that would require Theresa's mother or husband to supervise her with her daughter pending the investigation. (Tr. 2482-83, 2485- 86.) Theresa did not suggest any alternatives and agreed to the plan proposed by Boedigheimer. At the hearing before this court, Theresa acknowledged that she had an opportunity to read the safety plan forms (excluding the CERAP form), but that she did not in fact review them before signing. (Tr. 560.) She also testified, however, that Boedigheimer told her that "if he left [without a safety plan] and I [Theresa] was alone, they could come back and take [my daughter] S. away from me." (Tr. 562-63.)

Theresa complied with the safety plan in its entirety for about two weeks. As of April 27, 2000, the date she and her family went on vacation to Mexico, however, she no longer adhered to the requirement that she have only supervised contact with her daughter. (Tr. 566-67, 595.) Upon returning home from vacation, moreover, Theresa attempted to resume day care services in her home. When a DCFS representative made an unannounced visit and discovered that Theresa was caring for children in her home again, Theresa closed the day care and took a position as a nanny instead. (Tr. 596-98.) One year later, on May 17, 2001, Theresa learned that the investigation against her was unfounded and that the safety plan was no longer in effect.[5] (Tr. 581, 599.) A May 21, 2001 Family Assessment Factor Worksheet Summary noted that of the three doctors consulted in the case, all reported some

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[5] The parties do not indicate how Theresa learned this information on May 17, 2001. On May 21, 2001, however, Boedigheimer sent Theresa a letter notifying her of the unfounded decision. (PX D. at 43400.)

possibility that Theresa's story was accurate, and one opined that Dillon's injury was not the result of abuse. The document does not reflect when the doctors made these reports. (PX D, at 43301.) Nor is the court certain whether these reports, or some other factor, were the basis for the "unfounded" determination.

C. Stacey and Patrick D.

Patrick D. and his wife Stacey both worked at a day care center. On January 5, 2001, Karen Beckelman, an investigative supervisor with DCFS, began supervising an investigation into an allegation that Patrick had improperly touched a three-year-old child's bottom during nap time at the center. (Tr. 1509, 1518-19.) Beckelman assigned the case to investigator Andrea Jones and, during an initial meeting, advised her to find out whether Patrick had any biological children; if so, Jones was to look into implementing a safety plan pursuant to Department practice. (Tr. 1525-26.) DCFS insists that Beckelman "did not direct Jones to implement a safety plan" but only to "consider" it. (Def. Resp., at 29-30.) A January 5, 2001 Interview Note signed by Beckelman, however, states: "See the child at the day care. Put in a protection plan with the offender. Make sure he has no children. If he does also put in a plan in his home pending the interview." (PX B, at 44854.)

In any event, Jones spoke with Stacey D. by telephone on January 5, 2001 and, according to Stacey, told her that, due to the Hotline complaint, Patrick had to leave the home or Jones would come and take away their children. (Tr. 470.) Without asking any questions, Stacey denied the allegations on behalf of her husband and said she planned to contact an attorney. (Tr. 472, 838-39.) On January 9, 2001, Forensic Interviewer Kristin Eby conducted a

victim sensitive interview ("VSI") of the 4-year-old alleged victim, who reported that Patrick D. had touched her in a sexual manner. (Tr. 1539; PX B, at 45010.) Both Jones, who was present during the VSI, and Beckelman, who was not, found the statement to be credible. (There is no indication whether DCFS officials consulted with Eby herself regarding the victim's credibility.) Beckelman notified Stacey of the DCFS determination during a telephone conversation on January 10, 2001. (Tr. 1451; PX B, at 45010.) Beckelman also asked Stacey to confirm that Patrick was out of the house, and again informed her that if he was not, Beckelman would remove the children from the home. (Tr. 478.) Beckelman advised Stacey that Patrick needed to obtain a sexual "offender assessment"[6] before he could have unsupervised contact with his own children. (Tr. 1542.)

On January 15, 2001, Beckelman visited the D. apartment and individually spoke to each of the D. children and to Stacey and Patrick. (Tr. 484-85, 489-90.) Before leaving the apartment, Beckelman advised Stacey that the children could start seeing Patrick at church on Sunday. (Tr. 491.) Shortly thereafter on February 5, 2001, Stacey and Patrick met with Jones at a DCFS office. Jones told them that the investigation against Patrick was going to be "indicated" for "sexual molestation" of a four-year-old child and that he needed to have an offender's assessment in order to return to the D. home. (Tr. 501-02.)

DCFS did not proceed with an administrative hearing on the charges against Patrick D. until August 8 and 15 and September 10, 2001. (PX B, at

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[6] DCFS referred Patrick to Latino Family Services, P.C. for his "psychosexual assessment and follow-up treatment recommendations." (PX B, at 44980.)

70509.) On October 16, 2001, an administrative law judge found that the Department had failed to meet its burden of proving that Patrick had sexually molested a child or that he presented a risk of sexual harm to his own children. (*Id.* at 70520.) The ALJ noted that the victim's statements about the alleged abuse were inconsistent (she first said the touching occurred "one time," then later said it happened "every day" at naptime and lasted for "a couple hours"), and that the statements were not corroborated by any other evidence. (*Id.* at 70518.) Kristin Eby, who had conducted the VSI back in January, testified that the victim's "cheerful affect and volunteering of information about abuse are not common among victims of this age." (*Id.*) In addition, the evidence presented at the hearing showed that Patrick "had neither the inclination nor the opportunity to molest" the victim, given that other adults were often present in the room during naptime. (*Id.* at 70513, 70518.) The ALJ recommended that the indicated finding be expunged, noting that the investigation leading to the indicated report was "at a minimum sloppy, and at worst the result of a pre-ordained conclusion." (*Id.* at 70517.) Plaintiffs suggest that at least some of the exculpatory information on which the ALJ relied was, or should have been, available to the investigation at the onset of the investigation. *See DeLaFont v. Beckelman*, 264 F.Supp.2d 650, 654 (N.D.Ill.2003) (noting allegations that during investigation, Patrick D.'s own children and eight children in the day care center denied that he touch them inappropriately; also noting allegation that DCFS failed to interview Patrick D.'s co-teacher who later proved to have pertinent, exculpatory information).

Patrick was cleared of the indicated report on December 4, 2001, and the safety plan which had left him out of his home and unable to have

unsupervised contact with his children was officially lifted on December 10, 2001. (*Id.* at 44779.) As a result of this incident, Stacey D. and her family, represented by Lehrer & Redleaf, filed a lawsuit against several DCFS employees seeking compensatory and punitive damages relating to their actions during the investigation. (Tr. 845.)[7]

D. Jimmy and Christine Parikh

On July 12, 2001, DCFS investigator Michelle Abernathy was assigned to investigate an allegation that Jimmy Parikh had kissed 11-year-old Deanna K. while she and her siblings were at the Parikh home under the care of Jimmy's wife Christine.[8] (Tr. 2538.) Abernathy spoke with Deanna's father, who stated that though Deanna was temporarily living with him, she had previously lived with his ex-wife, Delta K. Abernathy next contacted Delta K., who advised that her daughter was a liar, that the issue had been resolved at a "family meeting,"[9] and that she did not understand why DCFS was involved. (Tr. 2358-59.)

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[7] *See DeLaFont v. Beckelman*, 264 F.Supp.2d 650 (N.D.Ill.2003) (dismissing several individual defendants from the case for lack of personal involvement in the alleged deprivations, but denying motion to dismiss claims that remaining three defendants violated plaintiffs' constitutional right to family autonomy and that two defendants deprived Patrick D. of his job without due process); *De La Font v. Beckelman*, No. 02 C 5448, 2003 WL 21294741 (N.D.Ill. June 3, 2003) (denying motions to reconsider); *De La Font v. Beckelman*, No. 02 C 5448, 2003 WL 22239726 (N.D.Ill. Sept. 29, 2003) (denying plaintiffs' motion to reinstate one of the previously-dismissed defendants).

[8] It does not appear that there is any family relationship between the Parikhs and the K.'s.

[9] It is not clear from the record who called the family meeting, who attended it, or when it took place.

Nevertheless, Abernathy went to the Parikh home and advised Jimmy, Christine, and their older daughter Justine (age 25) about the allegation. The Parikhs explained that Christine had been caring for three of the K. children and stated that there had been a "family meeting" during which Deanna had not said anything about the alleged incident. (Tr. 1269, 2540.)[10] After learning that there were two minor children living in the Parikh home, Abernathy told the Parikhs that she "would have to put a safety plan in place." (Tr. 2541 (Abernathy).) The plan required that Christine not babysit for any of the K. children and that Jimmy move out of the home and stay with Justine, who resided outside the Parikh home, during the course of the investigation. According to Christine, who says she was "frantic" at the thought of a safety plan, Abernathy warned that if Jimmy did not move out of the house and cease all contact with the minor children living in his home,[11] the children would be taken into DCFS custody. (Tr. 1304-05, 1309.) Abernathy explained the safety plan process and told the Parikhs that they could contact her supervisor to discuss any concerns they had regarding the plan. (Tr. 2540-42, 2547; PX H, at 44096.) Jimmy, Christine, and Justine all signed the plan and Jimmy packed a bag of clothes and left the house. (Tr. 2544.)

At some point prior to the end of July 2001, Abernathy's supervisor modified the safety plan to allow Jimmy to have supervised contact with his own children. Abernathy learned of this modification

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[10] Presumably this was not the same "family meeting" at which, according to Delta K., the matter has been resolved.

[11] In addition to Justine, the Parikhs had four other children: Emmie (age 27), Jason (age 22), Elissa (age 6), and George (age 3). (Tr. 1269.) At the time of the alleged incident, only Jason, Elissa, and George were living in the Parikh home. (Tr. 1270, 1272, 1276.)

during an unannounced visit to the home at the end of July. (Tr. 2553.) Around the same time, the Parikhs retained the law firm of Lehrer & Redleaf to represent them in the investigation. On July 26, 2001, the firm sent a letter to Abernathy's supervisor, John Ott, requesting that the plan be modified or revoked; on August 5, 2001, Jimmy was allowed to return to the P. home.[12] (*See* PX H, at 44045 ("minor resides with father and no longer goes to [the Parikh] home").) The safety plan remained in effect at that time, however, so Christine could not leave the children alone with Jimmy. (Tr. 1327; PX H, at 730001.) Two days later on August 7, 2001, the Parikhs' attorney notified Christine that Abernathy was recommending that the case be unfounded. Abernathy made the decision after speaking with Detective Larry Marks of the Des Plaines, Illinois police force, who told Abernathy that based on the alleged victim's psychological reports, there might be questions regarding the validity of her statements, and he did not believe that the police department would proceed with the case.[13] The attorney nevertheless recommended that the family continue following the safety plan until it was officially lifted on September 26, 2001. (Tr. 1331; PX H, at 730000.)

E. A.S.

A.S. is the biological mother of two sons, N. and P., and the stepmother of an 8-year-old girl, A. DCFS supervisor Linda Conti became involved with A.S. when the Hotline received a report that her older son, N., had sexually abused his younger brother, P., who was living with his maternal grandparents, the

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[12] The parties do not indicate who decided that Jimmy could return home or how or when the Parikhs were notified of the decision.

[13] It is not clear how Detective Marks became involved in the case.

H.'s, at the time. (Tr. 1455-56, 1458-60.) Conti called A.S. on August 23, 2000 and notified her of the pending investigation but did not disclose any specific allegations so that A.S. would, in Conti's words, "not to be able to taint the investigation." (Tr. 1463; PX F, at 42900.) Though there were no allegations against A.S., Conti recommended that she not have any contact with P. during the investigation out of concern that A.S. might encourage her son to recant or minimize the allegation. (Tr. 1464-65.) A.S. agreed to the recommendation without mentioning that she had an order from the Circuit Court of Winnebago County granting her the right to have contact with P. following her divorce from P.'s father. Nor did A.S. mention that she was involved in a custody battle with the H.'s regarding custody of P. (Tr. 1465-66, 1489; PX F, at 43034, 43036.)

On September 29, 2000, DCFS investigator Shalonda Cawthon called A.S. and told her that the investigation was going to be unfounded. (Tr. 1469-70; PX F, at 42923.) The investigator's notes state that the "perp[etrator] seemed more credible than victim ... Something happened to the victim no proof it was the perp (sib[ling])." (PX F, at 42921.) Cawthon nevertheless recommended that A.S. be allowed only supervised visits with P. "until the Department receives a completed assessment and recommendations from [a] psychologist." (PX F, at 42933, Letter from S. Cawthon to A.S. of 9/29/00.) By letter dated December 18, 2000, Conti notified A.S. that she no longer needed to be supervised during her visits with P. but should resume shared custody as provided by the court custody orders. (PX F, at 43043.) It is not clear whether this decision was in fact based on a psychologist's recommendation.

F. Debra C.

In June 2000, DCFS received a Hotline report alleging that Debra C.'s minor children were at risk of harm because two of her children had died years previously under suspicious circumstances, and a third child had almost died.[14] (Tr. 884-85, 896.) Debra C. is the mother of Robert (age 22), Thomas (age 21), Joey (born May 28, 1981, died September 1981), Jennifer (age 14), Steven (age 12), Jonathan (age 7), Jessica (age 8), and Katie (born December 20, 1997, died March 1998). (Tr. 1136-39.) Joey and Katie both died of sudden infant death syndrome. DCFS and the police investigated both deaths and determined that they were unfounded for abuse or neglect. (Tr. 1139-40.) In addition, Thomas reportedly stopped breathing and needed to be resuscitated when he was an infant. (PX G, at 43650, 43651.) In 1995, Debra suffered a breakdown and was diagnosed with bipolar disorder and depression. (Tr. 1142.)

DCFS supervisor Kathleen Tate interviewed Debra on June 8, 2000. Debra disclosed that she suffers from bipolar disorder, and Tate observed that she kept various medications together in a single bottle, which Tate found odd. (Tr. 907-08.) Tate determined that Debra's four minor children were unsafe and required that an older sibling come check on them "every day." (Tr. 916-17; PX G, at 43670.) One week later on June 15, 2000, DCFS implemented a new safety plan which provided that Debra's father and his wife would care for Debra's four minor children until the investigation was complete, but that Debra could have supervised visits with them every day. (Tr. 924-25; PX G, at 16731.) That same day, DCFS

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[14] It is not clear what event triggered the Hotline call.

investigator Eleanor Powell called Debra to notify her of the safety plan. (Tr. 925-26; PX G, at 16593.)

A few days later on June 18, 2000, the children went to visit their non-custodial father, Steven, for Father's Day. Steven did not return the children to Debra's father that night but instead kept them in his custody. Debra notified Powell of the situation during a telephone conversation on June 22, 2000, but Powell indicated that there was nothing she could do because DCFS had not placed the children with Steven. (Tr. 960, 1174-79.)

Toward the end of July 2000, Debra retained the law firm of Lehrer & Redleaf to represent her in the investigation. (Tr. 1229-30.) On July 26, 2000, the Department opened the case for services[15] and attempted to convince Debra to accept assistance from DCFS. (Tr. 946-50.) Specifically, the Department suggested that Debra get a drug and alcohol assessment and a bonding assessment, and that she continue to see her psychiatrist and to take her medication. (Tr. 1213-15.) Debra, however, did not believe that she needed such services and stated that she would only be willing to accept the assistance of a babysitter and a maid. (Tr. 1241-42.) The next day, on July 27, 2000, DCFS attempted to "screen" the case with the State's Attorney's office but the State's Attorney needed additional information from the investigator in order to proceed, such as Debra's psychiatric records and the medical records regarding the children who had died. (Tr.

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[15] Deputy Director Goad testified that "[i]n more serious cases we open in-home protective services cases, which means that we assign a DCFS worker, sometimes called an intact worker, to work with the family." (Tr. 2234.) Kathleen Tate testified that "once [a] case was opened for services then the intact family worker would go out [to see the family] weekly." (Tr. 917.)

936-37, 981; PX G, at 16606.) Also on July 27, DCFS attempted to take protective custody of the C. children, but they were not at the grandfather's home when DCFS arrived with the police. (Tr. 953-55.) Shortly thereafter on August 1, 2000, Kathleen Tate called Daniel Romero, a paralegal with Lehrer & Redleaf working on Debra's case, to inform him that the C. children would be returned (presumably, by their father) to Debra's father by August 7, 2000. (PX G, at 72541.)

For reasons not explained in the record, DCFS voluntarily unfounded the report against Debra on February 28, 2001. (Tr. 976; PX G, at 100257.) According to Tate, in the Department's view, the investigation was not typical because of the nature of the allegations, the past deaths of two of Debra's minor children, the family dynamics, the failure of Debra's psychiatrist to cooperate with the investigation, and the fact that Powell went on medical leave in the middle of the investigation. (Tr. 984-87 (Tate).) Plaintiffs disagree, arguing that "nothing about the handling of the C. case runs contrary to the express and acknowledged policies and practices of DCFS which permit safety plan directives including the loss of custody of children without notice, or any opportunity for a parent to be heard." (Pl. Reply, at 22.)[16]

G. Drs. S. and M.

On May 12, 2000, DCFS began investigating Dr. S. and his wife Dr. M. based on a report from a neighbor that she had observed through the window that Dr. S was sexually abusing his eight-year-old adopted daughter. DCFS investigator Martin

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[16] Plaintiffs' Reply Memorandum in Support of their Amended Motion for a Second Preliminary Injunction is cited as "Pl. Reply, at __."

Acevedo went to the family's home but Dr. S. and Dr. M. refused to let him interview the child. (Tr. 331-32, 335-36, PX A, at 70009.) Instead, Acevedo spoke with Dr. S. and Dr. M. for approximately two hours, in part explaining that he and Dr. S. needed to develop a safety plan. Dr. S. ultimately agreed to a safety plan requiring that he leave the home pending the investigation. Dr. S. understood from Acevedo that if he refused to agree to the plan, DCFS would take his daughter away or go to the police. (Tr. 338, 343, 346-48.)

Dr. S. stayed at a hotel over the weekend and by May 15, 2000 had retained Diane Redleaf of the Lehrer & Redleaf law firm to represent him. (Tr. 357, 371.) Ms. Redleaf wrote a letter to Hebert Bashir, a DCP Supervisor, on May 15, 2000 requesting in part that Dr. S. "may return home and remain home as long as his wife is also present." (PX A, at 70045.) That same day, DCP investigator Andrea Jones spoke with Ms. Redleaf and agreed to modify the safety plan to allow Dr. S. to have supervised visits with his daughter during the day. (Tr. 357, 371; PX A, at 70074.) As a result, Dr. S. was able to shield his daughter from the information that he was not sleeping at home at night; he stayed with her until she went to sleep and then returned to the house in the morning before she woke up. (Tr. 358.)

On May 18, 2000, DCFS conducted a victim sensitive interview of the daughter at the Children's Advocacy Center.[17] (Tr. 418; PX A, at 70022.) The next day on May 19, 2000, Jones spoke with Ms. Redleaf and notified her that the case against Dr. S. was being unfounded. (Tr. 358-59; PX A, at 70055.) Though the official notification did not arrive until June 15, 2000, Dr. S. moved back into his home on May 19,

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[17] The name of the person who conducted the interview and the corresponding notes are illegible.

with Ms. Redleaf's approval.[18] (Tr. 359-60, 376; PX A, at 70071.)

H. E.D.

On January 11, 2001, DCFS received a Hotline call reporting that sixteen-year-old E.D. had molested four-year-old Q.M. while babysitting for him approximately two years earlier. (Tr. 1414-15.) John Howell was assigned to investigate the allegation on behalf of DCFS. Howell conducted a victim sensitive interview of Q.M. on January 22, 2001. (PX I, at 44140.) Q.M. reported that E.D. "did something bad" to him but then, in Howell's words, "shut down" and refused to continue talking. (*Id.;* Tr. 1417.) Howell next interviewed E.D. and E.D.'s mother, Mrs. D., at the family home on January 25, 2001. According to Howell, E.D. "began to say something which very clearly indicated that he was acknowledging some sort of guilt, some degree of guilt in the allegation," but his mother stopped him and spoke with him privately for a minute. (Tr. 1428.) When E.D. and Mrs. D. returned, they told Howell that they had contacted an attorney; the attorney never authorized Howell to speak with E.D. after that time. (*Id.*)

Before concluding his initial interview, Howell told Mrs. D. that "a safety plan would have to be put in effect removing E.D. from the home for the safety of his [two younger] siblings." (PX I, at 44148 (interview notes); Tr. 1418.) The original plan required that E.D. remain outside the home until he completed a juvenile sex offender evaluation and any treatment recommended pursuant to that evaluation. (Tr. 1421.) Howell told Mrs. D. that if

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[18] Dr. S. retained separate counsel to represent him in a criminal investigation into his alleged misconduct. That investigation did not result in any criminal charges being filed. (Tr. 359.)

she did not agree to the plan, it was possible that DCFS would take custody of the two younger children. (Tr. 1419.)

On February 22, 2001, Howell conducted victim sensitive interviews of E.D.'s siblings, neither of whom made any significant disclosures. (PX I, at 44154, 44155.) During the interviews, Mrs. D. approached Howell and asked him to modify the safety plan. Howell, Mrs. D., and the D.s' attorney discussed a modification and ultimately agreed that E.D. could return home but could have no contact with younger children. In addition, Mrs. D. was required to remain "awake at night when the rest of the family is sleeping, in order to supervise [E.D.] at night." (Tr. 1422-23; PX I, at 44152, 44171(a).) The modified safety plan remained in effect until July 2002. (PX I, at 44177.) E.D.'s case was ultimately indicated for sexual penetration.[19] (Tr. 1428.)

I. Additional Cases

Plaintiffs rely on the circumstances of two additional cases in support of their motion for preliminary injunction, but do not provide a detailed summary of either case. Plaintiffs first claim that the March 22, 2002 directive from Deputy Director Goad, requiring that "all safety plans in which family members (children or adults) are relocated from their residence must be approved by the respective Child Protection or Field Service Manager," was ignored in two situations. (Pl. Mem., at 32-33.) In the first case, five-year-old I.W. lived with her mother, who had full custody rights, but visited her father on weekends. (DCFS Inter-Office Correspondence Regarding Safety Plans dated 3/22/02; Tr. 3168, 3170.) When I.W.'s mother was accused of abusing

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[19] The record does not reflect when E.D.'s case was indicated.

her, I.W. went to live with her father pending a DCFS investigation. DCFS investigator Cassandra Campbell nevertheless testified that I.W.'s October 14, 2002 safety plan did not constitute a "relocat[ion] from [her] residence" as contemplated by the March 22 directive. It is not clear from the record whether Campbell knew that the mother had full custody of I.W. when she implemented the plan. (Tr. 3170, 3181 (DCFS investigator, Cassandra Campbell).)

Plaintiffs also point to the I.W. case as evidence that DCFS investigators are not following the August 13, 2002 amendments to Appendix G requiring that safety plans be reviewed every five days. (Pl. Mem., at 33.) Specifically, there is no evidence that DCFS conducted any five-day reviews of I.W.'s safety plan even though it was scheduled to last "up to 60 days."[20] (Tr. 2989; PX T, at 45373-74.) In this second case, Plaintiffs submit the declaration of J.J., who signed a safety plan requiring that her husband leave their home pending a DCFS investigation into allegations that he had abused J.J.'s children from a previous marriage.[21] (Pl. Mem., at 23; Pl. Supp., at 2.) It is not clear whether DCFS conducted re-reviews of the plan every five days, but as of January 2004, the plan had been in effect for more than 75 days. (Ex. 1 to Pt. Supp.)

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[20] Plaintiffs do not indicate the actual duration of I.W.'s safety plan.

[21] Plaintiffs also submit the declaration of S.T., who signed a safety plan requiring that her paramour leave their home while DCFS investigated allegations that he was sexually abusing S.T.'s children from a previous marriage. Ex. 2 to Plaintiffs' Motion to Supplement Record in Support of Both their Second Preliminary Injunction Motion and their Motion to Amend the Class Definition (hereinafter "Pl. Supp.") S.T. is not a member of the class, however, because she has no legal relationship with the man required to leave the home. (*See* Order of 4/16/04.)

Discussion

Plaintiffs raise both substantive and procedural due process challenges to the safety plan process, arguing that DCFS, under threat of seizing class members' children, (1) implements safety plans on the basis of only nominal or no evidence of actual abuse or neglect, and (2) fails to provide any opportunity to contest the plans. Defendant insists that the plans satisfy the compelling public interest in controlling threats to a child's safety during the course of a DCFS investigation, and that all plans constitute voluntary agreements between the families and DCFS. With the limitations described below, the court finds that Plaintiffs are entitled to injunctive relief.

I.

PRELIMINARY INJUNCTION STANDARD

Plaintiffs seek a preliminary injunction prohibiting Defendant, a state official, from continuing to implement safety plans absent sufficient evidence of abuse or neglect and an appeal process. To obtain such relief, Plaintiffs must demonstrate (1) a likelihood of success on the merits; (2) irreparable harm if the preliminary injunction is denied; and (3) lack of an adequate remedy at law. *See Reid L. v. Illinois State Bd. of Ed.*, 289 F.3d 1009, 1020-21 (7th Cir.2002). When these threshold conditions have been met, the court must consider (4) the harm that Defendant will suffer if the injunction is granted, balanced against the irreparable harm to the Plaintiffs if injunctive relief is denied; and (5) the interest of, and harm to persons not directly involved in the dispute (the public interest). *Id.* at 1021.

II.

LIKELIHOOD OF SUCCESS ON THE MERITS

A likelihood of success on the merits of both Plaintiffs' substantive and procedural due process claims requires some showing of a liberty interest. The court thus first considers whether such an interest exists in this case. The court then addresses in turn the specific due process arguments.

A. Protected Liberty Interest

It is well-established that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights the [Supreme] [C]ourt has ranked as 'of basic importance in our society,' ... rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)). As the Seventh Circuit noted, "the right of a man and woman to marry, and to bear and raise their children is the most fundamental of all rights--the foundation of not just this country, but of all civilization." *Doe v. Heck*, 327 F.3d 492, 517-18 (7th Cir.2003) (quoting *Brokaw v. Mercer County*, 235 F.3d 1000, 1018 (7th Cir.2000)). Similarly, children possess a liberty interest in being raised and nurtured by their parents. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 760, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) ("until the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of the natural relationship"); *Heck*, 327 F.3d at 518; *Brokaw*, 235 F.3d at 1018.

The constitutional right to familial integrity, however, is not absolute. *Brokaw*, 235 F.3d at 1019.

To the contrary, this liberty interest "is limited by the compelling governmental interest in the protection of children--particularly where the children need to be protected from their own parents." *Id.* (quoting *Croft v. Westmoreland County Children and Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir.1997)). "Thus, a balance must be reached between the fundamental right to the family unit and the state's interest in protecting children from abuse, especially in cases where children are removed from their homes." *Id.* With these principles in mind, the court considers whether safety plans implicate Plaintiffs' due process rights.

B. Substantive Due Process

Plaintiffs claim that safety plans violate their right to substantive due process by depriving them of familial relations without sufficient evidence. In Plaintiffs' view, DCFS should not be allowed to implement a safety plan absent "some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Brokaw*, 235 F.3d at 1019 (quoting *Croft*, 103 F.3d at 1126). Defendant insists that all safety plans are voluntary agreements designed to further the public interest in protecting children and, thus, do not require any specific evidentiary showing. As explained below, the court finds neither party's position entirely persuasive.

Plaintiffs cite to several cases which purportedly demonstrate that safety plans are unconstitutional absent "definite and articulable evidence" of abuse or neglect. In *Doe v. Heck*, 327 F.3d 492 (7th Cir.2003), child welfare authorities received a report that a ten-year-old girl had been bruised during a spanking at a private school. The girl told investigators that another student, John Doe, had also been spanked by

the school principal. *Id.* at 500-01. Based on that report, the investigators interviewed John at his school without his parents' consent and "target[ed] the plaintiff parents [John Doe's parents] as child abusers." *Id.* at 521. At one point in the investigation, case worker Carla Heck left a voice mail message for the Does stating that "if she did not hear from their attorney within 24 hours, 'the Bureau will take steps to ... protect the children in your home ...' " and that she was " 'not messing around anymore!' " *Id.* at 505-06. The child welfare authorities never in fact removed any of the Doe children from their home, but the Does claimed that "[t]hroughout ... the Christmas season," they "lived in constant fear" that the authorities would do so. *Id.* at 506 n. 10.

The Does and others filed suit, alleging in part that the defendant child welfare authorities had violated the Does' right to familial relations and their Fourteenth Amendment procedural due process rights. *Id.* at 508. The district court granted summary judgment to the defendants, finding that even if their actions were unconstitutional, they were protected by qualified immunity. *Id.* The Seventh Circuit reversed, however, concluding that the defendants violated the Does' liberty interest in familial relations by targeting them as child abusers without any evidence that the Does themselves had ever abused their children or that their children had ever been injured as a result of a school spanking. *Id.* at 521-22. Despite the absence of any such evidence, the defendants launched an investigation based solely on another child's claim that John had been spanked (not injured) by the school principal (not John's parents).

The court concluded, similarly, that the threat to remove John and his sister from their parents' custody violated the Does' liberty interest in

maintenance of the family unit. *Id.* at 524. The court recognized that "child welfare caseworkers are often called upon to make difficult decisions without the benefit of extended deliberation," and that "there is, perhaps, no more worthy object of the public's concern than preventing the most vulnerable members of society, children of tender years, from being physically abused." *Id.* at 525. On the facts presented, however, it was not "difficult to weigh [the] state's interest in investigating an allegation of child abuse against [the] parent or child's right to familial relations" because "the defendants had no basis to suspect the plaintiff parents of child abuse, and thus had no reason to interfere with their familial relationships in the manner described." *Id.*

With one exception, the cases presented at the hearing before this Court are distinguishable from *Heck* because they involve allegations of abuse or neglect on the part of the parent or child under investigation. Thus, unlike in *Heck,* the Plaintiffs' right to familial relations here does not, in each instance presented above, obviously outweigh the state's interest in investigating allegations that Plaintiffs have engaged in child abuse or neglect. The A.S. case does involve a mother who was not allowed to see her son for approximately one month while DCFS investigated an allegation that the boy had been abused by his older brother. Unlike the Does, however, A.S. was aware of the investigation at all times and did not object to the arrangement. Plaintiffs dispute that A.S.'s agreement was voluntary--an argument the court addresses *infra* pp. 46-54--but the court notes that she signed the safety plan without advising the investigator about the court order granting her the right to have contact with her son, P.

As noted, Plaintiffs view *Brokaw* as setting forth the requirement of "definite and articulable evidence" of

abuse or neglect before a safety plan may be implemented. The plaintiff in *Brokaw* alleged that certain relatives and a deputy sheriff conspired to end his parents' marriage by filing "baseless and scurrilous" claims of child neglect with DCFS that they believed "would cause [the plaintiff] and his sister to be removed from their parents' home, and in turn prompt [the father] to divorce his wife and leave his family." 235 F.3d at 1007. At some point after the relatives made the allegedly baseless claims of neglect, two police officers walked into the plaintiff's home, grabbed him and his three-year-old sister, and carried them crying out of the home. The men did not explain what was happening and the six-year-old plaintiff believed he was being kidnapped and would be killed. *Id.* The children remained in foster care for approximately four months before being returned home. *Id.* at 1008. Upon reaching the age of majority, the plaintiff filed a complaint, alleging in part that his relatives and others had violated his substantive due process right to familial relations. *Id.* at 1017-18. The district court dismissed the claims for failure to state a claim or, alternatively, based on sovereign, absolute, or qualified immunity. *Id.* at 1008.

The Seventh Circuit reversed, finding that the plaintiff had sufficiently alleged a due process claim covering the four-month period during which he was separated from his parents. The court noted that the constitutional right to familial integrity must be balanced against the state's compelling interest in protecting children from abuse, "especially in cases where children are removed from their homes." *Id.* at 1019. "In balancing these interests, courts have recognized that a state has no interest in protecting children from their parents unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Id.* On a motion to

dismiss, the court lacked sufficient facts to determine whether the government was justified in interfering with the plaintiff's familial relations. The court also lacked sufficient facts to determine whether any of the individual defendants were entitled to qualified immunity. The court noted, however, that in general, "because the balance between a child's liberty interest in familial relations and a state's interest in protecting the child is nebulous at best, social workers and other state actors who cause a child's removal are entitled to qualified immunity because the alleged constitutional violation will rarely--if ever--be clearly established." *Id.* at 1023.

Brokaw is not particularly illuminating to the extent it involved children who were forcibly removed from their parents' home by two men who refused to identify themselves. In this case, Plaintiffs, all adults capable of communicating with child welfare authorities, knew that there was an investigation pending against them and agreed at least in form, however reluctantly, to cooperate with the plan by removing themselves or their children from the home. In addition, the children in *Brokaw* were placed in foster care and deemed wards of the state for four months; they did not remain with parents or relatives as in this case. The *Brokaw* court did note that other courts have required "definite and articulable evidence giving rise to a reasonable suspicion" of abuse or neglect, but did not explain what satisfies this requirement, particularly with respect to the imposition of safety plans such as are at issue here.

Plaintiffs also claim that the Supreme Court's decision in *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) "reinforces the conclusion that safety plans work significant deprivations, even when the deprivation is less extreme than removal of the child." (Pl. Mem., at

39.) The plaintiffs in *Troxel* sought visitation rights with their grandchildren under a Washington state statute that allowed "any person" to petition for forced visitation of a child. The children's mother wanted to limit the grandparents' visits to once per month, but a Washington Superior Court granted the plaintiffs' request for greater visitation rights as in the best interests of the children. *Id.* at 61-62, 120 S.Ct. 2054. The Washington Court of Appeals reversed, however, and the Washington Supreme Court affirmed that decision, reasoning that the Washington statute was unconstitutional because it allowed the State to interfere with the right of parents to rear their children without any threshold showing of harm, and because it allowed "any person" to seek visitation rights without recognizing that "[p]arents have a right to limit visitation of their children with third persons." *Id.* at 61-63, 120 S.Ct. 2054. *See* Wash. Rev.Code § 26.10.160(3) ("[a]ny person may petition the court for visitation rights at any time ... The court may order visitation rights for any person when visitation may serve the best interest of the child").

The United States Supreme Court granted certiorari and affirmed that the Washington statute, as applied, unconstitutionally infringed on the mother's fundamental right to make decisions concerning the care, custody, and control of her children. *Id.* at 66-67, 120 S.Ct. 2054. In reaching this conclusion, the Court found it significant that "the [plaintiffs] did not allege, and no court has found, that [the mother] was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children." *Id.* at 68, 120 S.Ct. 2054.

Although some of the language of *Troxel* is instructive, its rationale is not directly relevant here, either. In the Supreme Court's view, the problem

"[wa]s not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the mother's] determination of her daughters' best interests." *Id.* at 69, 120 S.Ct. 2054. In this case, conversely, safety plans are imposed on parents who are under suspicion of being unfit. Nor are questions regarding visitation rights directly comparable to investigations into allegations of abuse or neglect.

In short, none of these cases supports Plaintiffs' assertion that DCFS violates the Constitution when it implements safety plans absent "definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." (Pl. Mem., at 43) (citing *Brokaw,* 235 F.3d at 1019). Indeed, none addresses the situation presented here where a parent, legal guardian, or child is directly accused of abuse or neglect, thus calling into play the state's compelling interest in protecting a child's safety. The court recognizes that safety plans impose difficult restrictions upon families and, while they are in effect, deprive families of their right to familial relations. To determine whether such deprivation amounts to a constitutional violation, however, it must be balanced against the state's interest in protecting children. That interest is "extraordinarily weighty." *Darryl H. v. Coler,* 801 F.2d 893, 902 (7th Cir.1986). As the Seventh Circuit explained:

> The state has an obligation to prevent loss of life and serious injury to those members of the community to whom it has a very special responsibility, the young. As the Supreme Court remarked in *Wyman v. James,* 400 U.S. 309, 318, 91 S.Ct. 381, 386, 27 L.E.2d 408 (1971), "There is no more worthy object of the public's concern."

Id. Safety plans are designed for this very purpose: to protect children from harm during the course of a DCFS investigation.

Plaintiffs express concern that it is not always clear that a child is in any danger at all, such as when a child is merely "afraid" of persons who live in or visit the home. In addition, safety plans are often implemented even when only one of the 15 safety factors is checked "yes." (Pl. Mem., at 14 n. 8) (arguing that 61 of the 92 safety plans in the representative cases (66%) went into effect based on the presence of only one safety factor). Defendant insists that "many of these so-called safety plan cases do not involve safety plans at all," noting, for example, that some plans imposed no contact requirements only after an alleged perpetrator had been taken to jail and a court had imposed the same restriction. (Def. Resp., at 52-54.) Defendant cannot escape liability, however, by imposing conditions on Plaintiffs and then claiming that they did not technically constitute "safety plans."

The court recognizes that several plans in the sample cases were directed against non-class members, such as paramours of the alleged victims' mothers. The fact that some of the persons subject to safety plans are not class members does not speak to the proper standard required for implementing such a plan, however. Where an investigator has found even a single safety factor, the court finds that it is not improper for DCFS to err on the side of caution given the significant state interest in protecting children from harm. Under such circumstances, the court is satisfied that the state's interest in protecting children through brief or temporary safety plans outweighs Plaintiffs' right to familial relations, even upon a mere suspicion of abuse or neglect. The opposite conclusion may result in children being further abused or neglected during the course of a

DCFS investigation, which is what prompted the CERAP process in the first place. (Tr. 2243-44); 20 ILCS 505/21(e).

In the court's view, the safety plan imposed upon Drs. S. and M. represents the type of brief deprivation that is insufficient to trigger constitutional concerns. That plan went into effect on May 12, 2000 and required Dr. S. to leave the home pending an investigation into a neighbor's allegation that she had seen him through a window abusing his adopted daughter. By May 19, 2000, the case against Dr. S. was unfounded and he moved back into his home. Though it is regrettable that he had to spend a week away from his family, the court concludes that he did not suffer an unconstitutional deprivation of his right to familial relations as a result. On the other hand, Patrick D. was required to leave his home on January 5, 2001 due to an allegation that he had improperly touched another child during nap time at the day care center where he worked. His case was "indicated" for abuse in February 2001 but he did not receive an administrative hearing on the charges until August 8 and 15 and September 10, 2001. On October 16, 2001, relying at least in part on information available to the investigation from the beginning, an ALJ determined that the charges were unfounded and based on a "sloppy" investigation. The safety plan was not officially lifted, however, and he was not permitted to live with his children (none of whom were victims of the alleged abuse) until December 10, 2001--nearly a year after it forced him out of his home.

Even where the initial investigation supports imposition of a safety plan, the court believes such a plan may not remain in place indefinitely; to the contrary, at some point, the deprivation continues long enough to implicate Plaintiffs' liberty interests

and substantive due process rights. Neither party has provided useful insight into when this occurs. Plaintiffs insist that a deprivation lasting even a single hour is enough to run afoul of the Constitution. Defendant maintains that there can never be a constitutional deprivation because families always sign the safety plan and thereby agree to its terms. The answer lies somewhere in between, but absent adequate development of this issue by the parties, the court is not prepared to draw the line. The court does find, however, that safety plans lasting only a few hours or days do not implicate substantive due process rights even when coupled with a threat of protective custody. On the other hand, safety plans signed under such a threat do implicate substantive due process rights when they have no stated duration or an indefinite duration (*e.g.*, they are in effect "during the course of this investigation" (SAI 8, at 28502) or until a date "undetermined at this time" (SAU 40, at 41317)), at least where such plans continue for several days.

C. Procedural Due Process

Plaintiffs next argue that safety plans violate their procedural due process rights because they do not provide any opportunity to contest them. To establish that their procedural due process rights have been violated, Plaintiffs must demonstrate that (1) the Department deprived them of a constitutionally protected liberty or property interest; and (2) the deprivation occurred without due process of law. *Heck,* 327 F.3d at 526. Plaintiffs note that a "fundamental requirement of due process is the opportunity to be heard." (Pl. Mem., at 44) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) (internal quotations omitted)). Though Plaintiffs recognize that pre-deprivation process may be excused by exigent circumstances, they also stress that "the only

meaningful opportunity to invoke the discretion of the decision maker is likely to be before the [deprivation] takes effect." (Pl. Mem., at 44-45) (quoting *Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 543, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).)

The court has already determined that safety plans that separate children and families do deprive class members of familial relations. In addition, it is undisputed that DCFS provides no opportunity to contest safety plans, nor any notice of such an opportunity. Defendant once again argues that no process is due because safety plans are completely voluntary agreements. According to Defendant, "[i]ndividual parents are free to make a choice, albeit a difficult one, between protective custody of their child and the entry of a safety plan to keep the child safe." (Def. Resp., at 45.) While this may be true in a formal sense, for the reasons explained below, the court does not agree that Plaintiffs' formal acquiescence in plan terms extinguishes their procedural due process rights.

1. Voluntariness

Defendant relies on *Terry v. Richardson,* 346 F.3d 781 (7th Cir.2003) and *Doe v. Tullis,* No. 01-2044, slip op. (C.D.Ill. Nov. 25, 2003) in support of his assertion that all safety plans are voluntary. The plaintiff in *Terry* was a non-custodial father with rights to visit his daughter, Jaidah, pursuant to a divorce decree. 346 F.3d at 782. The plaintiff's ex-wife suspected that he was sexually abusing Jaidah and Jaidah confirmed the suspicion, telling her mother that her father had "hurt her, kissed her 'pee-pee,' forced her to swallow a necklace, tried to make her kiss his 'noodle,' and jammed crayons and a pen into her anus." *Id.* Jaidah's mother reported the plaintiff to the DCFS Hotline, and the next day, a DCFS investigator called the plaintiff and left a

message on his answering machine stating that he was to "cease all visitation and contact with [Jaidah]." *Id.* at 782-83. When the plaintiff returned the investigator's call, she told him that she could not explain the allegations over the phone and repeated that he was not to contact Jaidah. According to the investigator, the plaintiff responded "okay" or "I understand." *Id.* Two weeks later, the investigator interviewed the plaintiff at his attorney's office. At that time, she described the allegations against him and explained the investigation process. She also reiterated that the plaintiff was not to have any contact with Jaidah during the investigation. The plaintiff complied because "he had learned from 'news reports and things' that ignoring DCFS instructions could lead to termination of his parental rights or Jaidah's placement in a foster home." *Id.* at 783- 84.

After more than a year of proceedings, a court found that Jaidah had been abused, but not by the plaintiff, who was cleared of the allegations. The plaintiff filed suit against the investigator for violating his and Jaidah's due process rights and a jury found in favor of the plaintiff and his daughter. *Id.* at 784. In reversing that decision, the Seventh Circuit first determined that the plaintiff's deprivation, which ultimately amounted to losing just a single day of visitation, was minor compared with the state's substantial interest in protecting children from sexual abuse. *Id.* at 786. The court found it significant that the investigator did not try to sever the plaintiff's parental rights or remove Jaidah from his custody. *Id.* In addition, "a reasonable person with the resources available to [the plaintiff] would not have left [the investigator's] authority unquestioned," and could have refused to comply with the investigator's instruction. *Id.* at 785, 787. "Given the interests at stake, the options available to [the plaintiff] were enough to guard

against erroneous interference with his rights." *Id.* at 787.

Terry is distinguishable from this case in several respects and does not, in this court's view, establish that safety plans are by definition voluntary. First, the investigator in *Terry* never threatened to put Jaidah in protective custody; rather, the plaintiff merely "heard on television that disobeying DCFS caseworkers could spell the end of his parental rights or lead to foster care for Jaidah." *Id.* at 785. In this case, conversely, all class members were threatened that their children would be placed in protective custody if they refused to accept a safety plan. In addition, the plaintiff in *Terry* lost only a single day of visitation with his daughter, whereas most of the Plaintiffs in this case tost physical custody of, or contact with children and family members for several months. Significantly, many of the safety plans had indefinite or unstated durations.

Defendant next points to *Doe v. Tullis,* in which DCFS investigated plaintiff John Doe after receiving a Hotline report that he had sexually abused a child while he was babysitting for her one night. Slip op., at 2-3. The investigator interviewed the alleged victim and her sibling; the victim's mother; the hospital pediatrician who examined the victim and reported the abuse; and the pediatric social worker at the hospital. *Id.* at 3. The investigator also interviewed three of the Does' own children and one of their neighbors. Before speaking with John's wife, Jane Doe, the investigator and her supervisor discussed a possible safety plan for the family. After interviewing Jane, the investigator drafted a safety plan that required John to live outside the home and prevented him from having any unsupervised contact with his children "until we were further along in our investigation." *Id.* at 4. The investigator explained that violating the safety plan could result in the

children being removed from the home. According to the investigator, Jane agreed to the plan. *Id.* at 4-5.

Five days later, Jane signed a second safety plan with the following terms: "Jane Doe will allow [John Doe] no contact whatsoever with any children who are younger than eighteen; John Doe will not be in the home without approved supervision at any time when younger children are home; and in order for the plan to terminate, John Doe must obtain a sex offender assessment and follow any recommendations, and all safety factors must be resolved as determined by DCFS, with regard to the sexual abuse." *Id.* at 6. After the report against John was indicated, Jane and John signed (in the presence of their attorney) a third safety plan adding, in part, that (1) John could not live in, spend the night in, or be in the home "any time other than approved visiting time," (2) "CPI will continue to monitor the plan until the case is complete," and (3) "violation of the plan will result in protective custody of the Doe children." *Id.* at 6-7. The investigator believed that the plan was to remain in effect until she completed her investigation approximately two months later, but she did not notify the Does or their attorney that the plan was no longer in effect after that date. *Id.* at 7. John appealed the indicated finding; there is no indication as to whether his request for expungement succeeded. *Id.* at 21.

The Does filed suit against the investigator and her supervisor alleging violations of their constitutional rights. The Does first claimed that the defendants violated their right to familial relations by threatening to remove the Doe children from their parents' custody. *Id.* at 12. The court agreed that "threatening to remove children from their parents' custody violates the right to familial relations when the state has no reason to suspect that the parents are abusing the children." *Id.* at 13 (citing *Heck,* 327

F.3d at 524). The court found no such threat in that case, however, because the investigator merely "provided an alternative to removal when she told Jane Doe that she could take the children to stay with friends or family." In the court's view, "[r]equiring Jane Doe and the Doe children to stay with family and friends is not the equivalent of threatening to remove the children." *Id.* In reaching this conclusion, the court noted that "[a] safety plan is an optional and less disruptive alternative to either removing a child from his home based on a court order or removing a child and then seeking a court order." *Id.* at 14. According to the court, informing parents of the legal alternatives available to the Department, including removal of the children prior to a court order in exigent circumstances or pursuant to a court order, does not automatically constitute a threat sufficient to deprive parents of their constitutional rights. *Id.* The court denied summary judgment on the claim, however, based on a factual dispute as to whether the investigator had "repeatedly threatened to take the children away." *Id.*

The Does also claimed that the defendants violated John Doe's procedural due process rights by separating him from his children for more than seven months without an adequate investigation or a hearing. *Id.* at 15, 19. The court agreed that "[h]ad [the investigator] indeed failed to perform an investigation before instituting the safety plan, her decision would have failed to satisfy the 'reasonable suspicion' standard established in *Brokaw.*" *Id.* at 17. Before instituting the first safety plan, however, the investigator "had already performed substantial investigation," including interviewing the alleged victim, her mother and sibling; the pediatrician who reported the alleged abuse; a pediatric social worker; Jane Doe and three of her children; and one of the Does' neighbors. *Id.* at 16-17.

As for the hearing, the court first determined that the Does voluntarily agreed to the conditions and terms of the safety plan. *Id.* at 20. The court rejected the Does' argument that they were forced to sign the plan, finding that "[k]nowing the possible legal consequences of failing to participate in a safety plan [*i.e.*, having your children taken away] does not render involuntary one['s] agreement to participate." *Id.* at 20 n. 4. The court distinguished safety plans from the forcible removal of children from the home, noting that safety plans "provide an alternative way, based on the parents' cooperation, for the state to ensure the children's safety while allowing them to remain in their home." *Id.* at 22. The Does "always had the right to contact DCFS to determine when or how the safety plan might be ended ..., bring a suit in state court, or simply refuse to comply with the safety plan, which would have led to judicial intervention if DCFS intended to continue to keep John Doe separated from his children." *Id.* The Does failed to demonstrate that the hearing John received in seeking to expunge the indicated finding was inadequate, leading the court to conclude that John was not denied procedural due process. *Id.* at 21, 23.

The court is not persuaded that *Tullis*, an unreported decision from another district court, conclusively establishes the voluntariness of all safety plans. Though the *Tullis* court found no automatic threat when DCFS notifies parents that their children may be removed from the home absent a safety plan, it nonetheless denied summary judgment because questions of fact existed as to whether the investigator had "repeatedly threatened to take the children away." *Id.* at 14. All of the class members in this case were in fact threatened explicitly or implicitly with protective custody unless they agreed to a safety plan, which arguably adds a coercive element to the "agreement" process. In addition, unlike in *Tullis*, it is not clear that DCFS

"substantially investigated" the allegations against all Plaintiffs in this case prior to implementing a safety plan. In the Stacey and Patrick D. case, for example, the DCFS supervisor advised the assigned investigator to "put in a plan" at Patrick's home if he had small children, before anyone had actually spoken with the D. family or the alleged victim. (Tr. 1525-26; PX B, at 44854.)

Finally, the plaintiffs in *Tullis* failed to show that the expungement hearing provided inadequate process even though the proceeding did not address the conditions of the safety plan. *Id.* at 21, 23. Not all investigations, however, result in an "indicated" report or any opportunity for an expungement hearing. In addition, while the *Tullis* court noted that safety plans require the cooperation of parents and family members, it failed to address how "repeated[ ] threat[s] to take the children away" may affect a family's decision in that regard.

Both parties ask the court to consider the "totality of the circumstances" in assessing whether safety plans are voluntary, drawing by analogy from the criminal law on consent to a police search. (Pl. Mem., at 49; Def. Resp., at 48) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).) Plaintiffs argue that relevant factors include (1) whether DCFS makes any misrepresentations in securing agreement to the plan; (2) whether agreement to a plan is knowing and voluntary; (3) whether a class member had access to legal counsel or other advice; (4) the circumstances surrounding DCFS' request for agreement, including any time pressure and the state of mind of the class member; and (5) the relative power, authority, knowledge, and sophistication of the parties. (Pl. Mem., at 53-54.) Defendant insists that "knowledge of the right to withhold consent is not a prerequisite to proving that consent to a search was given." (Def. Resp., at 48)

(citing *Schneckloth*, 412 U.S. at 227, 93 S.Ct. 2041) ("[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.") Defendant also argues that

> under the current DCFS structure, and after administering the CERAP protocol, the "threat" to remove the children unless a safety plan is agreed upon would not be baseless or empty, rather it would be analogous to the Constitutionally permissible consent search situation in which the police threaten "in good faith" to get a warrant to search.

(*Id.* at 49.)

As noted earlier, the court agrees that there is clearly an element of choice to the safety plan process in that Plaintiffs at all times remain free to reject a plan. Moreover, some families may affirmatively welcome a safety plan.[22] For example, a mother who learns that her spouse may be sexually abusing her child may be relieved that DCFS agrees that her husband should leave the home pending an

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[22] Plaintiffs themselves reviewed several cases "in which they thought it likely that the class member's agreement to the plan was not coerced because a class member parent: (1) had agreed with DCFS that the alleged perpetrator class member was likely to be guilty of the alleged abuse; (2) had a concern (independent of any representations by DCFS) as to the merits of the allegations against the alleged perpetrator, regarding the safety of the children in the home if the perpetrator was not subject to restrictive conditions regarding his access to the children; and (3) had already taken the action of removing the perpetrator from the home, prior to and independently of any request an investigator had made as part of a proposed safety plan." (Pl. Mem., at 47 n. 22.)

investigation.[23] Nevertheless, we are faced here with a situation where DCFS investigators threatened to take away Plaintiffs' children if they refused to accept a safety plan, without affording any procedure for contesting that plan or its terms. Plaintiffs claim that the threat is found in the language of the Safety Plan Form itself, which states that "failure to agree to the plan or to carry out the plan may result in a reassessment of my home and possible protective custody and/or referral to the State's Attorney's Office for a court order to remove my children from my home." (Jt.Ex. 5(c), CFS 1441-A; Pl. Mem., at 50-51.) This language may not by itself constitute a threat of actual removal, as it merely notifies Plaintiffs of what "may" or "possibl[y]" will happen should a family choose to reject a plan. Indeed, the same paragraph expressly represents that agreement to a plan is voluntary. (*Id.*) *See also Tullis*, slip. op., at 20 n. 4. ("[k]nowing the possible legal consequences of failing to participate in a safety

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[23] Plaintiffs insist that this is irrelevant, at least for purposes of substantive due process rights, because "DCFS may not constitutionally effect what would other wise be an unconstitutional deprivation of one parent's rights simply by gaining the agreement (even the voluntary agreement) to the deprivation by the other parent." (Pl. Mem., at 42) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (state denied unwed father equal protection of the law by declaring his children wards of the state upon their mother's death and presuming that he was an unfit parent without first giving him a hearing on the issue); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923-24 (5th Cir.2000) ("[w]hen a biological parent com[es] forward to participate in the rearing of [her] child, [her] interest in personal contact with [her] child acquires substantial protection under the due process clause") (internal quotations omitted)). Assuming this is true, as explained earlier, the court concludes that where there is evidence of a safety concern, the state's interest in ensuring the safety of children by imposing a temporary safety plan outweighs a parent's liberty interest in caring for and associating with the child, at least for a brief period.

plan [*i.e.*, having your children taken away] does not render involuntary one['s] agreement to participate").

More troubling, however, is the fact that most class member witnesses testified at the hearing that the investigator assigned to their cases did more than just notify them of their options; instead, the investigator affirmatively threatened to take away Plaintiffs' children unless they agreed to a safety plan. When an investigator expressly or implicitly conveys that failure to accept a plan will result in the removal of the children for more than a brief or temporary period of time, it constitutes a threat sufficient to deem the family's agreement coerced, and to implicate due process rights. Significantly, Defendant has not identified a single family that, faced with such an express or implied threat of protective custody, chose to reject the plan.

As for Defendant's suggestion that the threat to remove children from the home is analogous to a police officer's threat to obtain a search warrant, the court is unpersuaded. If a criminal suspect declines to consent to a search, law enforcement officials may well be able to conduct a search in any event without consent, but only after obtaining a warrant from a court. If, however, a family declines to consent to a safety plan, DCFS can take protective custody of their children without first obtaining a court order. The protective custody would then trigger court process and a hearing within 48 hours, but the ability to take the children first and obtain court approval later distinguishes DCFS procedures from those in the criminal context. Moreover, seizure of one's children, even for 48 hours, is arguably more intrusive than searching one's home.

Plaintiffs devote significant attention to arguing that they did not knowingly and intelligently waive their due process rights by signing the safety plans. (Pl.

Mem., at 55-62.) The court recognizes that DCFS procedures do not mandate that investigators explain the actual requirements for taking a child into protective custody or the available options for contesting such action. In addition, families faced with the choice between entering a safety plan or losing their children may not be capable of making an informed, rational decision, or seek the advice of an attorney. Nevertheless, the court need not decide whether or to what extent this or the other factors may also figure into the voluntariness assessment. It is sufficient that agreement to the plans at issue here was secured in a coercive manner under the investigator's express or implied threat of protective custody lasting more than a brief or temporary period of time.

2. Process Due

Having determined that safety plans effect a constitutional deprivation when combined with an express or implied threat of protective custody that is more than brief or temporary, the court next considers what process is due to class members who sign such plans. The parties agree that *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) guides this analysis:

> Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35, 96 S.Ct. 893.

It is undisputed that Plaintiffs have a "fundamental" liberty interest in familial relations. *Troxel,* 530 U.S. at 65, 120 S.Ct. 2054 ("the interest of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by this Court"). It is also undisputed that child safety is an important state interest. *Darryl H.,* 801 F.2d at 902 ("[t]he state has an obligation to prevent loss of life and serious injury to those members of the community to whom it has a very special responsibility, the young"). The relevant inquiry thus turns on the risk of an erroneous deprivation of Plaintiffs' interest in familial relations under existing DCFS procedures, and the probable value of additional or substitute procedural safeguards. *Mathews,* 424 U.S. at 334-35, 96 S.Ct. 893. On this issue, the balance weighs decidedly in Plaintiffs' favor: DCFS has no procedure whatsoever for families to contest safety plans. Defendant insists that "each circumstance is unique," and that "[t]he case law is clear and the facts are overwhelmingly illustrative of the singularity and distinctiveness of each case." (Def. Resp., at 54.) The fact that individual circumstances are unique does not, however, support the conclusion that no family members are entitled to a procedure to contest safety plans.

To be sure, some cases involving safety plans result in "indicated" reports. Nevertheless, the liberty interest in familial relations is so great that even a small risk of erroneous deprivation must be addressed in some fashion. Indeed, DCFS's own expert, Dr. Mark Testa, agreed that the availability of procedures to contest a safety plan would not alter the effectiveness of the CERAP process. (Tr. 2829-30.) Defense expert Dr. Carl Bell also opined that if DCFS is unable to work out an acceptable safety

plan with a family because, for instance, the investigator failed to consider family strengths and mitigating circumstances, "there ought to be--that family should have some sort of a review[,] something in place so that that could be corrected." (Tr.2021- 22.) In the court's view, it would not be difficult for DCFS to develop a simple and inexpensive procedure for Plaintiffs to seek review of safety plans. To the extent DCFS is correct that there is a degree of voluntariness in all of the plans--and some plans are in fact entirely voluntary--there presumably will be no request or need for review in a large proportion of the cases.

Neither party addresses the nature of the procedures required, and the court declines to fashion a remedy unilaterally. Nonetheless, the court offers the following observations. To the extent safety plans serve as less intrusive alternatives to protective custody, it cannot be the case that class members are entitled to equal or greater remedies than those provided under the Abused and Neglected Child Reporting Act and the Juvenile Court Act. Those statutes require a hearing before a judicial officer within 48 hours of the child's removal from the home, a time frame too restrictive for the safety plan context.[24] In addition, it seems to this court that making families wait an entire month before giving them an opportunity to contest a plan may be excessive. Indeed, the August 2002 amendments

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[24] Plaintiffs' suggestion, in a footnote, that DCFS should be required to provide a hearing before implementing a safety plan except in exigent circumstances, is not consistent with this opinion. Nor is the court confident that three days is an appropriate length of time within which to conduct a hearing. (Pl. Mem., at 87 n. 30) (citing *Jordan by Jordan v. Jackson*, 15 F.3d 333, 351 (4th Cir.1994).) The *Jordan* court merely approved, as an "outer limit," a 65-hour delay between protective custody of a child and a hearing before a judicial officer.

(which were not in place during most of the episodes described above) recognize the importance of vigilantly monitoring safety plans by requiring re-review every five days. It is not clear that investigators are complying with this directive, or that any such re-review constitutes a meaningful reconsideration of a plan or its terms. (*See, e.g.*, I.W. case) (Tr. 2989; PX T, at 45373-74) (no evidence that DCFS conducted any five-day reviews of safety plan with a stated duration of "up to 60 days.") In any event, DCFS itself concedes that safety plans are intended to be short-term measures, and that limitation must be considered in determining what constitutes a reasonable time to contest a plan. Finally, though this case addresses only safety plans secured by threat of protective custody, the parties should not overlook the importance of uniformity in the safety plan process, even when a family's agreement to a plan is entirely voluntary.

III.

IRREPARABLE HARM/BALANCING OF HARM/ PUBLIC INTEREST

Defendant barely addresses the question of irreparable harm, arguing primarily that Plaintiffs are wrong to suggest that the liberty interest in familial relations is "virtually absolute." (Def. Resp., at 54.) In support of this argument, Defendant cites a 1987 case from the Eighth Circuit Court of Appeals, which states that

> parental liberty interest in keeping the family unit intact is not a clearly established right in the context of reasonable suspicion that parents may be abusing their children. If law enforcement personnel who have at least arguable probable cause to believe that adults have been molesting children are not entitled to reasonable belief that

> the adults may pose a danger to their own children, then the law was (and is) not clearly established on this point.

Myers v. Morris, 810 F.2d 1437, 1463 (8th Cir.1987). The plaintiffs in *Myers* had been charged by the county attorney with criminal sexual activity involving one or more minor children. They alleged, among other things, that the county prosecutor, county sheriff's deputies, and others caused them to suffer loss of liberty and alienation of affection by arresting the plaintiffs without probable cause and then removing minor children from their homes on "police holds" after the arrests. *Id.* at 1444.

The quoted language above appears in the court's discussion of whether the sheriff's deputies were entitled to qualified immunity from suit. The plaintiffs challenged "the summary removal of children before attempts were made to substantiate incriminating statements of other children through normal investigative techniques." *Id.* at 1462. The sheriff's deputies were entitled to qualified immunity on such claims if there was a "legitimate question" as to the legality of summarily separating children from parents who had been accused of criminal acts towards others. *Id.* The court found there was such a legitimate question given that "other children had described abuse by the arrested persons upon their own children." *Id.* at 1463. Thus, the sheriff's deputies were qualifiedly immune from further litigation. *Id.*

The court does not see how *Myers* is instructive in assessing the balance of hardships between the parties. Plaintiffs have presented ample evidence that they suffered emotional and psychological injury as a result of safety plans lasting for more than a brief or temporary period of time. (Pl. Mem., at 62-77.) The court recognizes the importance of the

state's interest in protecting children from harm, but concludes that this interest does not outweigh the irreparable harm (1) to individuals whose lives are disrupted by safety plans which require family members to live outside the home or which restrict contact between family members for an indefinite or unstated duration; and (2) to individuals who, under an express or implied threat of protective custody, sign safety plans lasting more than a brief or temporary period of time, but have no available means of contesting those plans.

IV.

MANDATORY OR PROHIBITORY INJUNCTION

Plaintiffs argue that the court should enter an injunction prohibiting DCFS from implementing safety plans that violate their constitutional rights, "not one that imposes or directs defendant to erect a new administrative scheme for putting safety plans into effect, or permitting class members to contest them." (Pl. Mem., at 85) (citing *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791, 798 (7th Cir.1995)) (affirming injunction requiring state to comply with "motor voter" law, but finding "no occasion for the entry of a complicated decree that treats the state as an outlaw and requires it to do even more than the 'motor voter' law requires"). In Plaintiffs' view, "neither DCFS (nor the state courts, for that matter) need devise or erect any new remedial structures in order to ensure the provision of such protections: the protections are already in the Juvenile Court Act, and class members may avail themselves of these protections in ordinary course." (Pl. Mem., at 86.) Defendant makes no response to this argument.

The court nevertheless disagrees with Plaintiffs' contention that the appropriate remedy here is simply to enjoin safety plans and mandate compliance with the procedures available under the Juvenile Court Act. The JCA provides for court review only when a child is taken into protective custody, not when DCFS implements a safety plan, and as explained earlier, the court does not believe that all safety plans trigger constitutional concerns as a matter of course. Nevertheless, Plaintiffs are entitled to some opportunity to review restrictions placed on their contacts with their children. Further, the court notes its belief that persons subject to safety plans are entitled to immediate notice of the basis on which the investigator has determined such a plan is necessary, as well as notice of the expected duration of such a plan and an explanation of the process and schedule for seeking review of restrictions imposed by the plan. As for what those procedures should entail, the court, having found a constitutional violation in this case, now defers to DCFS to fashion an appropriate remedy consistent with this opinion. *See Massey v. Helman,* 35 F.Supp.2d 1110, 1115 (C.D.Ill.1999) (citing *Bush v. Lucas,* 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983)) ("the [Supreme] Court has deferred to the legislature to fashion appropriate remedies for constitutional violations"). The court suggests that in developing these procedures, DCFS consider whether the procedures adopted for child care workers in *Dupuy I* may be altered or enhanced to address the safety plans at issue here. *See Dupuy v. McDonald,* No. 97 C 4199, 2003 WL 21557911 (N.D.Ill. July 10, 2003). DCFS is also invited to explain the degree to which the 2002 amendments may address concerns raised by this opinion.

Conclusion

For the reasons stated above, Plaintiffs' motion for a preliminary injunction (Doc. Nos.488-1, 488-2) is granted in part and denied in part. The court agrees that Plaintiffs are entitled to injunctive relief, but declines to categorically enjoin safety plans. DCFS has sixty (60) days to develop constitutionally adequate procedures consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 07-1655

BELINDA DUPUY, *et al.*,
Plaintiffs-Appellants,

v.

ERWIN MCEWEN, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES,
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 97 C 4199—Rebecca R. Pallmeyer, *Judge.*

October 15, 2007

Before

HON. FRANK H. EASTERBROOK, *Chief Judge*
HON, RICHARD A. POSNER, *Circuit Judge*
HON TERENCE T. EVANS, *Circuit Judge*

Order

On September 4, 2007, plaintiffs-appellants filed a petition for rehearing with suggestion for

rehearing *en banc*, and on September 19, 2007, defendant-appellee filed an answer to the petition. All the judges on the original panel have voted to deny the petition, and none of the judges in regular active service has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED.**

7

No. 07-1075

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

BELINDA DUPUY, *ET AL.*, PETITIONERS,

v.

ERWIN MCEWEN, DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners, a class of alleged perpetrators of child abuse or neglect, claimed that Illinois Department of Children and Family Services' child welfare investigators violate their substantive and procedural due process rights by coercing their agreement to "safety plans," *i.e.*, limitations on contact with their children pending the investigation. As relief, the Class sought an injunction against safety plans "in any form."

The question this case presents is:

Whether the Seventh Circuit correctly held that the Class failed to show evidence of systematic coercion necessary to establish a due process claim on behalf of all class members.

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BRIEF IN OPPOSITION

The Class and its amici seek review in this Court on the flawed premise that the Seventh Circuit rejected a "totality of the circumstances" approach to voluntariness and held that all safety plans are voluntary. But this ignores the case's procedural posture as a class action and misstates the decisions below. In fact, the Seventh Circuit invited the Class to demonstrate coercion not only by misrepresentations but by any "other improper means." Pet. 19a. The court acknowledged that individual facts — such as a parent's "lack [of] education" or "low intelligence" — may bear on the "voluntariness" inquiry (Pet. 3a), but the Class simply could not prove such facts on a class-wide basis. The Class conceded that it could not establish systemic misrepresentations by investigators, and the Seventh Circuit rejected its attempt to rely on factors that applied only to "some of the class members," for "a plaintiff obviously cannot obtain class-wide relief for harms suffered by only some of its members." Pet. 3a.

In short, the Class needed to show systemic, class-wide coercion, and it failed to do so. Accordingly, there is nothing to its repeated charge that the Seventh Circuit erred in holding that all safety plans are voluntary, or that this case presents the Court with an opportunity to reject that position. *See, e.g.*, Pet. 11, 13, 14, 15, 16, 19, 20. It was the Class's burden to present sufficient evidence to bridge the gap between an individual claim of coercion and its claim that all safety plans are *un*constitutional. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58 (1982). But

the Class failed to do this below (and does not claim to be able to do so now), and the Seventh Circuit reached the unremarkable holding that relief was unavailable absent such class-wide evidence. *See* Pet. 3a. That holding does not warrant this Court's review.

The petition also omits critical aspects of Illinois procedure. First, if a parent does not agree to accept a safety plan, and an investigator removes the child, the parent is entitled to a judicial hearing within two working days, at which point the Department must meet its burden of proof for removal. Second, parents can always stop complying with the plan. One of the class members testified below that she simply refused to continue following it, and she suffered no adverse consequences. Pet. 57a. At most, a parent's refusal to follow a safety plan takes the parties back to square one — the investigator must determine whether there is evidence sufficient to satisfy the statutory requirement for removal and, if the child is removed, then the parent receives a hearing within two working days. Unlike a safety plan, a plea agreement does not permit criminal defendants to walk out of prison and demand a trial whenever they like.

Accordingly, there is no conflict between the Seventh Circuit's decision and either this Court's case law or the Third Circuit's decision in *Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123 (3d Cir. 1997). The Seventh Circuit invited the Class to marshal whatever evidence of class-wide coercion it could on remand, consistent with the "totality of the circumstances" inquiry that the Class espouses based on this Court's decisions. And as the Seventh Circuit itself recognized, *Croft* is easily

distinguished, for the investigator in that case (which involved an individual plaintiff, not a class): (1) had received only an anonymous, sixth-level hearsay allegation of abuse, and (2) had formed no opinion about whether abuse had occurred. *Id.* at 1126-27 & n.5. Here, the Class failed to present evidence that investigators invariably lacked any evidence of abuse when offering a safety plan, or that investigators (like the investigator in *Croft*) systematically lacked sufficient evidence to create reasonable suspicion of abuse when threatening to remove a child to obtain agreement to safety plans. Indeed, if further evidence that there is no split were needed, the Seventh Circuit itself has struck down conduct like that in *Croft* as unconstitutional. *See Doe v. Heck*, 327 F.3d 492, 524-25 (7th Cir. 2003).

In sum, the Seventh Circuit neither upheld all safety plans as constitutional, nor did it reject a "totality of the circumstances" test for constitutional voluntariness. It concluded that the Class had no class-wide evidence of coercion, and it properly distinguished the investigator's baseless threat in *Croft*. This case presents no issues warranting this Court's review, and its status as a class action makes it an extremely poor vehicle for answering the questions set out in the petition, even if they were fairly presented by the facts or decisions below (and they are not). Finally, as the district court recognized, the Department procedures to which class members testified below have been amended (*see infra* p. 8), meaning much of the factual evidence on which the district court relied is no longer meaningful, for the only relevant practices are the Department's current ones in a case seeking only injunctive relief.

For all these reasons, this Court should deny the petition.

STATEMENT

1. In 2006, approximately 905,000 children nationwide were victims of abuse or neglect, and maltreatment is the leading cause of death and injury among children. www.cdc.gov/od/oc/media/transcripts/2008/t080403.htm; see also www.cdc.gov/mmwr/preview/mmwrhtml/mm5713a2.htm. Respondent is the Director of the Illinois Department of Children and Family Services, which is charged with investigating reports of child abuse and neglect. 325 ILCS 5/2 (2006). Up to 100 children die of abuse in Illinois annually. Tr. 2294.

Although the Class indicates otherwise, only a "small number" of Hotline reports are anonymous; approximately two-thirds come from mandated reporters, *e.g.*, medical professionals and teachers, who report a child's statement or visible injuries. Tr. 2213-14. And only 65,000 of the approximately 350,000 reports received annually are even investigated; reports based on "very long chains of hearsay" and the like are not. Pet. 31a, Tr. 2227. Approximately 37% of investigations are resolved within 10 days, and 60% are resolved within 30 days. Tr. 2255. No more than 10%, and perhaps as few as 2%, of investigations involve safety plans, and only 5% of the plans involve temporary relocation of a family member. Tr. 3000-01.

After several children were seriously injured or killed in the early 1990s shortly after the Department became involved in their cases, the Illinois legislature mandated implementation of a risk assessment

standard. Pet. 33a. Accordingly, the Department formed a multidisciplinary committee of external experts to develop the Child Endangerment Risk Assessment Protocol (CERAP), which "quickly assess[es] the potential for moderate to severe harm immediately or in the near future" to permit investigators to "tak[e] quick action to protect children." Pet. 33a-34a. The child is to be seen and interviewed within 24 hours of the report, if not earlier (89 Ill. Admin. Code § 300.100(c)), and the CERAP is to be completed within 48 hours of a report (Pet. 34a). Studies show that recurrence of abuse dropped 40% five years after the CERAP was instituted. Tr. 2245, 2792, 2295, 2427.

Using the CERAP, an investigator first determines if any enumerated risk factor[1] or other cause for concern exists, using all available information, including the initial report, observing and talking with the child and household members, observing the home environment, the child's age and developmental status, the mental, medical, and developmental status of the parent(s) or other person(s) responsible for the child's safety, the type, severity, location, and extent of any injury to the child, and the intent, severity, and duration of behaviors directed toward the child. Pet. 36a-38a. A factor is deemed to exist only when there is "clear evidence or other cause for concern" about that factor, and the existence of any one factor, standing alone, does not mean a child is unsafe. Pet. 36a-37a.

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[1] Enumerated factors include, for example, "reasonable cause to suspect that a member of the household caused moderate to severe harm to the child or made a plausible threat" thereof. Pet. 35a n.1.

If no factor exists, the process ends; otherwise, the investigator determines if the factor may be partially or fully controlled by mitigating circumstances. Pet. 38a. If a factor is controlled, the child must be deemed "safe," *i.e.*, not likely to be in immediate danger of moderate to severe harm. Pet. 39a.

If the child is deemed "unsafe," however, an investigator has only two ways to avoid the immediate risk of harm: remove the child, or develop and obtain agreement to a safety plan. Pet. 39a. A safety plan's terms depend on the circumstances, but it must be as minimally disruptive to the child and family as possible, minimize separation issues for family members, and rely on resources that are "immediately and realistically available" to the family. Pet. 40a-41a (internal quotations omitted), 46a. If a parent refuses a safety plan, the investigator must reassess the situation and consider removing the child and/or referral to the State's Attorney's office for a court order.[2] Pet. 40a-43a. If the child is removed, a hearing must be held within two working days, and the child must be returned if the Department fails to meet its evidentiary burden. 705 ILCS 405/2-9(1) (2006).

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[2] An investigator may remove a child (with prior approval, unless an emergency exists) when there is "reason to believe that the child cannot be cared for at home or in the custody of the person responsible for the child's welfare without endangering the child's health or safety" and there is no time to obtain a court order. 325 ILCS 5/5 (2006). The other alternatives are to petition for adjudication of wardship or to open a juvenile court case. Pet. 50a-52a. The Class did not challenge these procedures.

The safety plan form itself states that the person signing it (the parent or other person responsible for implementing it) understands that it is voluntary and that "[w]e understand that failure to agree to the plan or to carry out the plan *may* result in a reassessment of my home and *possible* protective custody and/or referral to the State's Attorney's Office for a court order to remove my children from my home. I will then have the opportunity to plead my case in court." Pet.42a-43a (emphases added). The form also states that the signatory discussed the safety plan with the investigator and understands its contents. Pet. 42a. It states what will be done to protect the child, who is responsible for implementing action, and how it will be monitored. Pet. 41a. It also must state a time frame for implementation and continued monitoring, as well as the conditions under which it will be terminated and an estimated time frame therefor. Pet. 41a, 46a. In addition, it must contain a contingency plan if the primary safety plan is no longer needed. Pet. 41a. A copy of the form, which provides telephone numbers for the investigator and her supervisor, must be given to the family. Pet. 44a, 42a.

The investigator must inform the family that its cooperation with a plan is voluntary and, if possible, enlist the family's participation in its development, and then explain the plan (and the potential consequences of refusal) to the family. Pet. 40a-43a. The investigator must give the family information about the potential consequences if the plan is refused or violated and also must sign the form, stating that s/he discussed it and the consequences of non-compliance with the person(s) signing it, who agreed to comply with it. Pet. 42a-43a.

A plan must be approved by the investigator's supervisor, and since March 2002, a Department manager must approve any plan that includes relocation of family members, taking into account whether (1) the child is genuinely unsafe; (2) the plan will adequately protect the child(ren) in a way that is minimally disruptive to all family members; and (3) there is a reasonable and timely potential resolution to the safety plan. Pet. 41a-42a. The manager also must track the case to assure timely and appropriate resolution under Department procedures. Pet. 42a.

After a safety plan is in place, a family may ask that it be modified, and an investigator may modify it. Pet. 49a. Since August 2002, moreover, when Department procedures were amended (*after* the events to which the witnesses in the district court testified), Department personnel must inform parents that "'cooperation with the plan is voluntary,'" the family must receive "'information about the potential consequences if the plan is refused or violated,'" where possible the Department must enlist "'the family's participation in the development of the plan,'" which must be "'minimally disruptive,'" all plans must "'specify the conditions under which the plan is to be terminated and an estimated time frame within which this can be expected to occur,'" the Department must reassess the plan every five working days, and the family must be notified when the plan ends. Pet. 42a-49a.

The Department also must provide support services, including counseling or referrals to therapy, for parents or children in need of such services. Pet. 52a.

2. The instant action was commenced in 1997 as a class action, and petitioners are a subclass (the Class), ultimately defined as alleged perpetrators of child abuse or neglect "required by [the Department], under threat of protective custody [of their child(ren)], to adhere to and/or carry out" a safety plan. Doc. 531 at 8. The Class alleged that a safety plan offer, standing alone deprived them of the right to family autonomy (and thus required a hearing), as did any threat to remove a child to gain agreement to a safety plan; they sought an injunction against safety plans "in any form." Pet. 92a & n.23, 30a.

The district court conducted a 22-day evidentiary hearing on the Class's motion for a preliminary injunction. Pet. 53a. To support its claim that all safety plans are unconstitutional, the Class presented testimony from only a few class members, many of whom complied with safety plans while represented by counsel. Pet. 53a-70a.

A child in Theresa C's day care center required emergency surgery for a skull fracture that the attending physician concluded was "highly unlikely" to have been caused by a fall, as Ms. C. claimed. Pet. 55a-56a. Ms. C. agreed to suspend her day care center operation in light of her upcoming planned vacation. Pet. 56a. She signed a safety plan without reading it, although she stopped complying with it two weeks later. Tr. 560; Pet. 57a.

After Mr. DeLaFont was reported to have inappropriately touched a child at the day care center where he and his wife worked, his wife initially refused

to agree that he had to leave the home and said she planned to contact an attorney instead.[3] Pet. 58a.

After a report that James Redlin sexually abused his mildly autistic son on a train, he and his wife retained counsel, but Ms. Redlin agreed that her husband would not act as an independent caretaker for any children until the report was resolved, and the attorney advised the Redlins to continue following the safety plan after unofficial notice that the report would be unfounded. Pet. 54a-55a.

Jimmy Parikh reportedly kissed an eleven-year-old girl his wife was babysitting, and the couple retained counsel, who recommended that they continue following the safety plan until it was officially lifted. Pet. 63a.

A mother stopped her son, E.D., from speaking to an investigator when he "began to say something which very clearly indicated that he was acknowledging some sort of guilt, some degree of guilt in the allegation," saying they had contacted an attorney. Pet. 70a. The safety plan, which originally provided that E.D. remain away from home until he completed a juvenile sex offender evaluation and any recommended treatment, was later modified with the attorney's approval. Pet. 70a.

An investigator visited Debra C. after a report that her four minor children were at risk of harm because

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[3] The DeLaFonts filed suit against (among others) the investigator and her supervisor, but the jury returned a verdict for the defendants. *DeLaFont v. Beckelman*, No. 02-5448 (N.D. Ill., Dec. 1, 2005).

two of her children had died of sudden infant death syndrome years earlier, and after the non-custodial father kept the children (who were staying with their maternal grandparents under a safety plan), she retained counsel. Pet. 66a. The Department offered her support services, such as a drug and alcohol assessment and a bonding assessment, but she refused, stating she would accept only a babysitter and a maid. Pet. 66a.

When a neighbor provided an eyewitness report that Dr. S sexually abused his 8-year-old adopted daughter, the parents refused to allow an investigator to interview the child and promptly retained counsel. Pet. 68a; Tr. 338-51.

The Class presented no evidence that any class member (or any attorney therefor) (1) questioned a plan's terms; (2) requested different terms that were refused; or (3) requested the CERAP form or information about the abuse allegation but was denied.

The district court concluded that the Class was "entitled to injunctive relief, but decline[d] to categorically enjoin safety plans," and it instructed the Department "to develop constitutionally adequate procedures consistent with" its decision within 60 days. Pet. 101a. It rejected the Class's argument that the safety plan form's language "by itself constitute[s] a threat of actual removal, as it merely notifies Plaintiffs of what 'may' or 'possibl[y]' will happen should a family choose to reject a plan," adding that the form expressly states that agreement is voluntary. Pet. 92a. The court later entered a preliminary injunction, accepting (with modifications) the Department's proposed revised procedures, which included review of a safety plan

upon request and a new brochure for parents. Pet. 24a-28a; see also Resp. 1a (current brochure).

3. Still dissatisfied, the Class appealed, but the Seventh Circuit affirmed, noting that "when a child's safety is threatened, that is justification enough for action first and hearing afterward." Pet. 17a-19a, 12a (internal quotation marks omitted).

Addressing the Class's substantive due process claim, the court held that class-wide injunctive relief required evidence that the Department "really does coerce agreement to its safety plans wrongfully by misrepresentations *or other improper means*." Pet. 19a (emphasis added). In doing so, the court distinguished *Croft*, where the evidence demonstrated that the investigator threatened removal based on evidence that was insufficient for removal, whereas the Class had failed to present evidence of any such class-wide practice here. Pet. 18a.

Like the district court, the Seventh Circuit also rejected the Class's procedural due process argument that a mere safety plan offer, standing alone, is unconstitutionally coercive, observing that the form merely "informs the parents of the *possibility* that the child will be removed [if the plan is refused] — information that is in the nature of a truism." Pet. 18a-19a (emphasis in original). The Seventh Circuit analogized a safety plan offer to a civil settlement offer, explaining that "it is not duress to offer someone a benefit you have every right to refuse to confer, in exchange for suitable consideration." Pet. 17a (internal quotations omitted). A safety plan offer, standing alone, does not deprive parents of the right to family autonomy, the court reasoned, because parents

have the unilateral right to reject the offer and the Class's evidence did not suggest that safety plan offers are systemically made without any suspicion of abuse or neglect. Pet. 13a-17a. Because a safety plan offer, standing alone, does not deprive parents of their rights, the court continued, no hearing is required for that offer. Pet. 14a.

4. In response to respondent's motion for summary judgment, and notwithstanding the Seventh Circuit's explicit recognition that coercion could be demonstrated with evidence of "other improper means" of coercion (Pet. 19a), the Class insisted the Seventh Circuit recognized only "one narrow circumstance under which it would deem a safety plan to have been wrongfully coerced": knowing misrepresentation of facts or law to obtain agreement to a safety plan (Doc. 941 at 5-6, 11, 18, 23, & n.2). Because the Class conceded that it had no such evidence, and made no attempt to present evidence of class-wide coercion by other improper means, as the Seventh Circuit had invited, the district court granted respondent's motion. Pet. 21a-23a.

5. The Class appealed, and the Seventh Circuit summarily affirmed. Pet. 1a-6a. The court found significant that the Class had not retracted its concession that it had no class-wide evidence of misrepresentation or of any other means of unlawful coercion. Pet. 3a. Although recognizing that lack of education or low intelligence may justify a finding of coercion for a particular class member, the court rejected the Class's argument that harm to some class members could support class-wide relief under Civil Rule 23. Pet. 3a.

The Class's petition for rehearing en banc was denied without a single dissenting vote. Pet. 102a.

REASONS FOR DENYING THE PETITION

The Class urges review based on purported conflicts between the Seventh Circuit's decision and (1) one readily distinguished circuit court decision (Pet. 14-16), and (2) this Court's precedents on parental rights (Pet. 16-19) and voluntariness (Pet. 19-25). In addition, the Class urges review on the timing of any hearing, an issue the Seventh Circuit did not reach, based on that court's purported misunderstanding of the Class's argument and a claimed conflict with this Court's procedural due process jurisprudence. Pet. 26-28. The Class is wrong on all counts.

The very premise of the petition — that the Seventh Circuit held that all safety plans are always voluntary as a matter of law — is incorrect. The Seventh Circuit merely rejected, for lack of class-wide evidentiary support, the Class's claim that all safety plans are coerced and thus *per se* unconstitutional. This decision is consistent with *Croft*'s holding that the investigator's threat to remove a child if the accused father did not leave was a substantive due process violation, but because it was based on a "total absence of objective evidence" of abuse and the investigator's admission that she had formed no opinion about whether abuse had occurred. And when presented with *Croft*-like evidence in a different case, the Seventh Circuit reached a decision like the Third Circuit's in *Croft*. And it is the Class's claim of *per se* coercion, not the Seventh Circuit's decision, that would conflict with this Court's totality-of-the-circumstances, case-by-case analysis for voluntariness. Indeed, the

Class's inability to present evidence of class-wide "improper means" of coercion handily illustrates why a class action is a poor vehicle for this coercion claim.

Likewise, the Seventh Circuit's holding on the Class's procedural due process claim — that the Class failed to show that a safety plan offer, standing alone, deprives parents of their right to family autonomy (and thus requires a hearing) — is fully consistent with the Court's precedents on parental rights. Furthermore, Illinois law already provides several procedural vehicles for challenging any deprivation of parental rights, which were available to class members (and their often-promptly-retained counsel). Lastly, the Class fails to explain why post-2001 amendments to the safety plan form, and to Department procedures and policies, have not mooted most of its claims.

At bottom, the Class and its amici merely challenge the Seventh Circuit's application of settled constitutional principles to an evidentiary record devoid of the class-wide evidence needed to support class-wide relief. Certiorari should be denied.

I. As the Seventh Circuit Recognized, Its Holding That the Class Failed to Present Class-Wide Evidence of Improper Means to Coerce Agreement to Safety Plans Is Fully Consistent With *Croft*.

Selectively quoting the Seventh Circuit's opinion, the Class and their amici insist repeatedly that the court held that "all 'safety plan[s are] voluntary'" (*see, e.g.*, Pet. 11, 13, 14, 15, 16, 19, 20), and then argue that this purported holding conflicts with a single appellate court decision. This alleged conflict, however, relies

upon mischaracterizations of the Seventh Circuit's opinion, the evidentiary record, and *Croft*. The Seventh Circuit held only, and unremarkably, that class-wide relief was unavailable without class-wide evidence of "improper means" of coercion, which the Class did not have. Pet. 12a-19a.[4] The court properly distinguished *Croft* on the ground that the threat there was "not grounded in proper legal authority" because the investigator claimed that she definitely would remove the child when she actually lacked any evidentiary basis for removal. Pet. 18a.

Thus, *Croft* held that an investigator who threatened to remove a child that very night unless the father left the home violated the parents' substantive due process rights, but *not* on the grounds that all threats of removal are unconstitutional or that every safety plan offer, standing alone, requires reasonable suspicion of abuse, as the Class contends. Pet. 14-16. Rather, *Croft* held that the investigator's threat was unconstitutional because it was based on a "total absence of objective evidence," *i.e.*, a "six-fold hearsay report by an anonymous informant," which the parents denied, *and* the investigator candidly admitted that she lacked enough information even to form an opinion about whether abuse had occurred. 103 F.3d at 1126-27 & n.5. Were there any doubt about *Croft*'s narrow

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[4] The petition does not challenge the Seventh Circuit's conclusion that the Class was limited to evidentiary points it could establish on a class-wide basis. Indeed, this is well-established law. 7AA Wright, Miller, & Kane, *Fed. Practice & Procedure: Civil 3d* § 1775, at 41 (3d ed. 2005).

reasoning, the Third Circuit itself later clarified that the threat in *Croft* was unconstitutional because it was "without any valid basis." *Miller v. City of Philadelphia*, 174 F.3d 368, 376 (3d Cir. 1999). In short, the investigator in effect removed the father from the home by implying that she could do so when in fact she lacked *any* suspicion, much less a reasonable one, of abuse.

Accordingly, *Croft*, as clarified by *Miller*, and the Seventh Circuit's decision are easily harmonized. Both courts agree that the threat in *Croft* was unconstitutional because it was "without any valid basis" (*id.* at 376) and "not grounded in proper legal authority" (Pet. 18a). Indeed, when presented with facts like those in *Croft* — a threat of removal with "no reason whatsoever" to suspect parents of abuse — the Seventh Circuit reached precisely the same conclusion. *Doe*, 327 F.3d at 524-25 (holding that threat to remove child if parents did not call investigator within 24 hours was unconstitutional).

The Class, however, insists that the Seventh Circuit's decision is inconsistent with *Croft* because the record is "replete" with evidence of threats to remove children unless a safety plan is accepted, threats they claim are "indistinguishable" from the threat in *Croft*. Pet. 16. But *Croft* did *not* hold that every threat of removal is unconstitutional. It held only that threatening actually to remove a child is unconstitutional *when the investigator lacks reasonable suspicion of abuse*. Here, unlike the parents in *Croft*, who presented evidence that the investigator relied on sixth-level hearsay and admitted she had no opinion about whether abuse had occurred when she made the

threat, the Class conceded it could not show systemic misrepresentation by investigators, and presented no evidence that investigators threaten immediate and certain removal, class-wide, despite "a total absence of objective evidence" and despite not having formed any opinion about whether abuse has occurred.

Indeed, the anecdotal evidence offered in the district court is that investigators often had objective evidence of abuse, *e.g.*, a doctor's opinion that the witness's description of a child's fall was "highly unlikely," a child victim's own credible statement of sexual touching, a neighbor's eyewitness account of sexual penetration, and an alleged perpetrator's own indication that he molested the child. *See, e.g.*, Pet. App. 56a, 59a, 67a, 69a. Some witnesses also testified that they were given time, sometimes days, to consult an attorney, or that their attorney did not object to the safety plan. *See, e.g.*, Pet. 54a, 58a. On this record, the Seventh Circuit's rejection of the claim for class-wide injunctive relief is fully consistent with *Croft*, for the Class lacked class-wide evidence that investigators actually threaten to remove a child without sufficient evidence to do so.

The Class also insists that *Croft*'s requirement of "objective evidence creating reasonable suspicion" of abuse to threaten certain removal conflicts with the Seventh Circuit's decision that "reasonable suspicion" is not required for a safety plan offer, standing alone. Pet. 14-16; Homeless 9 & n.3. But *Croft* merely held that reasonable suspicion was required for the threat of certain removal because that threat (as opposed to the consent form's truthful statement that removal "may" occur) imposed the same "degree of interference with the [parents'] rights" as removal itself and thus

had to be supported by the same quantum of evidence that removal requires. 103 F.3d 1126. *Croft* cannot be read, as the Class does (Pet. 15), to hold that the mere offer of a safety plan, standing alone and without threat of the child's certain removal, poses the same degree of interference with parental rights as actual (or threatened) removal and thus requires reasonable suspicion of abuse. There is no conflict on this point between *Croft* and the Seventh Circuit's decision.

In sum, the Seventh Circuit, both here and in *Doe*, agrees with *Croft*'s holding that threatening actually to remove a child without sufficient evidence to do so violates substantive due process rights, and given the lack of any class-wide evidence of investigators threatening to remove a child without reasonable suspicion, the Seventh Circuit's refusal to permit relief is fully consistent with *Croft*.

II. The Seventh Circuit's Decision That a Mere Safety Plan Offer, With No Threat of Removal, Does Not Deprive Parents of the Right to Family Autonomy Is Consistent With This Court's Parental Rights Precedents.

The Class and their amici emphasize the "fundamental liberty interest of natural parents in the care, custody, and management of their child" (*Santosky v. Kramer*, 455 U.S. 745, 753 (1982)), to the virtual exclusion of the well-established rule that States have a "wide range of power for limiting parental freedom and authority in things affecting the child's welfare" (*Prince v. Massachusetts*, 321 U.S. 158, 167 (1944)). Indeed, as *Croft* explicitly held, "this liberty interest in familial integrity is limited by the *compelling* governmental interest in the protection of

children — particularly . . . from their own parents." 103 F.3d at 1125 (emphasis added).

Other than *Croft*, discussed above, the Class and its amici allege no circuit split over whether the mere offer of a safety plan, without a threat of removal, requires "reasonable suspicion of abuse or neglect," unlike removal (or the threat of removal). Instead, they fabricate a conflict between the Seventh Circuit's decision and this Court's jurisprudence on parental rights in two ways. Pet. 16-19. Both arguments fail.

First, the Class contends that all safety plan offers, standing alone, "force" separation, because such offers are rarely refused. Pet. 17. But the Class admitted that some parents in fact welcome plans, as when the alleged perpetrator is domestically violent. Pet. 91a n. 22. Furthermore, several class members testified that, at least initially, they did refuse a safety plan or later renege on it, one testified that she did not read it before signing, and some testified that they immediately retained counsel, who apparently advised them to comply. Pet. 53a-70a. Given this evidence, the Seventh Circuit correctly concluded, the Class failed to show that a safety plan offer, standing alone, "forces" separation for all class members.

For its other argument on this point — that a ruling that a safety plan may be offered without reasonable suspicion of abuse[5] conflicts with the

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[5] The Class's statistical argument on this point — that the Department determines two-thirds of Hotline reports are unfounded (Pet. 17) — is misleading. Fewer than 20% of all reports are even

Court's precedent — the Class relies on four cases in addition to *Prince*. Pet. 16-19. The Seventh Circuit's decision, however, is perfectly consistent with all of them. All five have one thing in common that makes them readily distinguishable from the instant case: every one challenged a statute that necessarily resulted in the deprivation of a right, whereas a parent always has the right to refuse a safety plan offer.

Two of the Class's authorities challenged laws governing termination of parental rights, not custody rights. *Quilloin v. Walcott*, 434 U.S. 246, 255-56 (1978) (rejecting father's substantive due process challenge to law that did not require finding that he was unfit before permitting adoption of his illegitimate child); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (invalidating laws mandating payment of record preparation fees to appeal order terminating parental rights, distinguishing custody rights). *Prince* rejected a challenge to child labor laws as violating parents' fundamental right to control their children. 321 U.S. at 169. *Troxel v. Granville*, 530 U.S. 57, 67-73 (2000) (plurality opinion), invalidated a Washington visitation statute whose "broad, unlimited power" (1) subjected the mother's visitation decisions to mandatory state court review (by giving anyone the right to petition anytime for visitation), and (2) permitted courts to overturn a fit custodial parent's visitation decision, based solely on the court's best interests determination and without giving the mother' decision any weight. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), has nothing to do with parental rights — it rejected a

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investigated. Pet. 31a.

substantive due process challenge to an assisted suicide ban.

None of these cases is apposite here, given that no Illinois law (or policy) mandates that everyone being investigated must accept a safety plan. As the Seventh Circuit pointed out, parents always have the unilateral right to reject the offer, or to refuse to comply with a plan after they initially agree. Pet. 13a-14a. Indeed, the Class's own evidence demonstrated that this right was exercised: class members testified that they initially refused a safety plan, and one refused to continue complying after just two weeks. *See, e.g.*, Pet. 58a, 53a-54a, 57a.

Indeed, it is the Class's view that all safety plan offers are *per se* unconstitutional (Pet. 16) that cannot be reconciled with *Troxel*, which explicitly declined to hold that even all visitation *statutes* "violate the Due Process Clause as a *per se* matter," on the ground that adjudication on this issue is generally case-by-case (530 U.S. at 73). And if the Class were correct in its view that the mere *offer* of a safety plan is unconstitutional without reasonable suspicion of abuse, then *Troxel* surely would not have declined to decide whether a showing of harm is required for the far more intrusive act of *ordering* visitation against a parent's wishes. *Ibid.*

In sum, the Seventh Circuit's holding that a mere safety plan offer, standing alone, does not deprive parents of their liberty interest in family autonomy is fully consistent with the Class's authorities on parental rights. Indeed, these challenges to statutes that necessarily deprived parents of their rights have little relevance to the evidentiary issue of whether the

Class presented sufficient class-wide evidence to justify class-wide relief.

III. The Seventh Circuit's Decision That a Safety Plan Deprives Class Members of the Right to Family Autonomy Only if Agreement Is Obtained by "Improper Means" of Coercion Is Fully Consistent With the Court's Voluntariness Jurisprudence.

Although the Class failed to present class-wide evidence at the 22-day preliminary injunction hearing to support its claim that investigators unconstitutionally coerced members' agreement to safety plans, the Seventh Circuit explained that the Class nevertheless could prevail at trial by proving "that the state really does coerce agreement to its safety plans wrongfully by misrepresentations *or other improper means*." Pet. 19a (emphasis added). At summary judgment, the Class was forced to concede it had no evidence of legal or factual misrepresentations class-wide (Pet. 22a), and it presented no "other improper means" of class-wide coercion either. Now, the Class and its amici complain that the Seventh Circuit narrowed the definition of coercion in ways that conflict with the Court's definition. They are wrong.

A. The Seventh Circuit's Definition of Coercion — "Misrepresentations *or Other Improper Means*" — Is in Accord With the Court's Most Recent Ruling on the Issue.

Ignoring the Seventh Circuit's open-ended invitation to produce evidence of "other improper

means" of coercion, the Class zeros in on the court's use elsewhere of the term "illegal means," which it calls the court's "*singular* test" for coercion. Pet. 20 (emphasis added) (citing Pet. App. 15a). Amici similarly misread the Seventh Circuit's opinion as "basing voluntariness on a single factor", *i.e.*, misrepresentation to induce agreement. Homeless 6. But they all gravely mischaracterize the court's decision, which recognized low intelligence or lack of education as factors that could demonstrate coercion in a particular case, facts that the Class and its amici insisted should be considered, but merely rejected the notion that such individual circumstances could justify class-wide injunctive relief under Civil Rule 23 unless common to the entire Class. Pet. 3a.

The Class also ignores *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), which rejected a property owner's claim that the government tried to "blackmail" him into agreeing to give up part of his property for an easement. During the six years the property owner refused repeated demands for the easement, the government cancelled his right-of-way, charged him with permit violations, changed his permit period, denied his permit renewal application, revoked another permit, unilaterally voided a preliminary settlement agreement, and even brought criminal charges against him. *Id.* at 2593-95. These actions, which were within the government's authority, were "legitimate tactics designed to improve the Government's negotiating position" and thus not actionable, because "[e]ach may seek benefits from the others, and each may refuse to deal with the others by insisting on valuable consideration for anything in return. And as a potential contracting party, each neighbor is entitled to

drive a hard bargain." *Id.* at 2602. *Wilkie* also distinguished conduct that was within the government's authority (and thus not coercive) from trespass and other illegal conduct. *Id.* at 2603.

The Seventh Circuit's reasoning is fully consistent with *Wilkie*. It held only that the Class presented "no evidence" of improper means of coercion, such as misleading language on the safety plan form, and "no suggestion that the agency offers a safety plan when it has no suspicion at all of neglect or abuse," adding that parents have a prompt legal remedy (the 48-hour hearing) even if a child were removed without reasonable suspicion of abuse in an individual case. Pet. 15a-16a. It also held that when an investigator has sufficient evidence to remove a child and thus the authority to do so, that investigator's truthful statement that she will exercise that right if the parents do not agree to a safety plan cannot be deemed unconstitutional. Pet. 16a.

Rather than *Wilkie*, the Class cites mostly older cases from various contexts (contracts, Fifth Amendment, Article III standing, Fourth Amendment), contending that the possibility of serious harm (here, removal) is coercive *per se*, especially if it is subjectively understood to be likely. Pet. 20-23 & n.2. Not all their amici seem to agree. Homeless 4. But the Seventh Circuit's decision does not conflict with any of these authorities. One agrees with *Wilkie* that duress arises only from a "wrongful" act or threat, and it held merely that whether a release may be set aside due to duress presents a question of fact for the jury (*Capps v. Ga. Pac. Corp.*, 453 P.2d 935, 939 (Ore. 1969)), which itself conflicts with the Class's proposed *per se* rule of coercion. The other merely held that, as

a matter of Alabama law, "improper or unjustified demands" that leave "little choice" may constitute economic duress. *Haston v. Crowson*, 808 So.2d 17, 22 (Ala. 2001).

The Class also relies on two inapposite cases on the admissibility of confessions. The consequence of a Fifth Amendment violation (*i.e.*, certain conviction, likely incarceration, perhaps the death penalty) are far different from the two possible consequences of refusing a safety plan offer that is based on less than reasonable suspicion of abuse: the child and the alleged perpetrator both remain at home, or the child is removed but returned two working days later, after the judicial hearing, if the Department cannot meet its evidentiary burden. Pet. 15a-16a. Moreover, neither of these Fifth Amendment cases conflicts with the Seventh Circuit's decision. One held only that Congress could not supersede *Miranda*'s constitutional rule for admissibility of confessions (*Dickerson v. United States*, 530 U.S. 428, 444 (2000)), while the other held, unsurprisingly, that a confession from one who was probably insane and incompetent, and interrogated for eight or nine hours in a tiny room occasionally filled with police officers and without counsel, was inadmissible (*Blackburn v. Alabama*, 361 U.S. 199, 205 (1960)).

Three of the Class's other authorities mention coercion only in the distinct context of Article III standing: *Steffel v. Thompson*, 415 U.S. 452 (1974) (holding that party had standing to bring action for declaratory relief because prosecution was genuinely threatened); *Terrace v. Thompson*, 263 U.S. 197, 216 (1923) (holding that property owner was not obliged to risk prosecution, fines, imprisonment, and loss of

property to bring facial challenge to state law); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 S. Ct. 764, 776 (2007) (holding that licensee had standing to seek declaratory judgment of patent invalidity without first terminating or breaching license agreement). In fact, *MedImmune* instructs the Class that its members' dilemma — choosing between abandoning parental rights or risking removal (for only two working days, unless there is reasonable suspicion of abuse) — is solved by filing a declaratory relief action (127 S. Ct. at 773), which is also available to every parent under Illinois law (735 ILCS 5/2-701 (2006)).

Still another of the Class's authorities (and of its amici (Cato 15-21; Bar Ass'n 15-17)) concerns the doctrine of unconstitutional conditions, but the Class never raised that theory below, so it is not properly before the Court now. Eugene Gressman, *et al.*, *Supreme Court Practice*, § 6.37, 506 (9th ed. 2007). Even if it were, *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 592 (1926), addressed whether a state law may impose an unconstitutional requirement as a condition precedent to enjoying a privilege, but one of the Class's other authorities *upheld* a state law permitting a party to give up a constitutional right in return for a benefit. *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972). As for *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the Class mischaracterizes it as holding that timely tax payments are exacted "under duress" if the tax payer is certain of a penalty for late payments. Pet. 23. *McKesson Corp.* stated only that "*[i]f* a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund

action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful retrospective relief to rectify any unconstitutional deprivation." 496 U.S. at 31 (emphasis added). As explained in Part IV, *infra*, Illinois provides both contemporaneous and retrospective relief for any unconstitutional deprivation in connection with safety plans.

In sum, each of the Class's authorities is perfectly consistent with the Seventh Circuit's voluntariness ruling.

B. The Class's Rule That Safety Plans Are *Per Se* Involuntary, Not the Seventh Circuit's Opinion, Is Inconsistent with this Court's Case-by-Case, "Totality of the Circumstances" Test for Voluntariness.

The Class contends that the Seventh Circuit's purported holding that "all safety plans are voluntary"[6] conflicts with the Court's voluntariness precedents. Pet. 23-25. This argument poses a threshold problem for the Class and amici: the touchstone in such cases is reasonableness, as "measured in *objective* terms by examining the totality of the circumstances" in each case, and in which the Court "ha[s] consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette*, 519 U.S. 33, 37-39 (1996) (emphasis

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[6] Again, this misstates the Seventh Circuit's holding, which was that the Class failed to prove that all safety plans are involuntary using factors common to all class members. Pet. 3a, 16a, 19a.

added, internal quotations omitted) (rejecting *per se* rule that every attempted interrogation be preceded by saying "[a]t this time, you legally are free to go"); *Florida v. Bostick*, 501 U.S. 429, 433 (1991) (rejecting *per se* rule that random bus searches conducted pursuant to passenger's consent are always involuntary seizures). Thus, it is the Class's rule that all safety plans are *in*voluntary *per se* (Pet. 21, 23), a rule it must advocate because it seeks relief on behalf of a class, that directly conflicts with the Court's voluntariness precedent.

Some amici make a related but distinct error, insisting that "[w]hether an individual voluntarily consents is basically a question of *that individual*'s intent or mental state." Homeless 11, 16. This subjective inquiry, however, not only conflicts with the Fourth Amendment's objective one but also would be impossible to litigate class-wide. As for other amici's view that "well-documented scientific research regarding human decision-making" "should play an integral role" in coercion analysis (Psychoanalytic Ass'n 5-17), the Class attempted to present expert testimony on coercion (Tr. 990-1118), but the district court gave little credence to that testimony (Tr. 2050), and does not rely on it in its decision. Indeed, neither the Class nor the amici point to a single decision from any court relying on scientific research to create a *per se* rule on voluntariness.

If anything, the arguments of the amici illustrate that an action for class-wide injunctive relief is singularly inappropriate for this coercion claim. They emphasize the wide variety of possible circumstances for each parent (Psychoanalytic Ass'n 6-7) and "factors unique to" particular parents (Homeless 8). The

Seventh Circuit invited the Class to marshal evidence of improper means of obtaining consent class-wide, and the Class failed to do so — its counsel admitted that the Class had no evidence of systematic misrepresentations when threatening removal, and the Class's attempts to claim other means of coercion failed for lack of proof that they existed class-wide. Likewise, the Class's *per se* rule would deem all safety plan offers coercive, even when counsel advises parents to agree and to comply (as here), or a parent's subjective "actual understanding" is completely unreasonable, or one parent actually wants the alleged perpetrator out of the home and therefore favors a safety plan, as the Class admitted was true of some class members (Pet. 91a n.22). Thus, as pointed out by the Seventh Circuit (Pet. 3a) *and* as revealed by class members' own testimony (Pet. 53a-70a) and illustrated by amici's arguments, a class action is simply an extraordinarily poor vehicle for the Class's coercion claim. And the Seventh Circuit's coercion ruling is record-bound (rather than based on a "presumption" of voluntariness (Psychoanalytic Ass'n 3): the Class presented no evidence that agreement was coerced by the form alone, given the truthful language about the *possible* consequences of refusal (Pet. 18a-19a), it conceded it had no evidence of class-wide threats of removal unsupported by sufficient evidence to remove the child (Pet. 3a, 19a), and it made no attempt to present evidence of "other improper means" of class-wide coercion.

The Seventh Circuit's decision is also fully consistent with this Court's Fourth Amendment jurisprudence. In fact, the consent form tells parents that agreement is voluntary (Pet. 92a) even though

Robinette indicates that parents need not be told "you are legally free to refuse" a safety plan offer (519 U.S. at 37-39), and even though *Bostick* reiterated that officers may ask potentially incriminating questions, and even request consent to search luggage, with no basis at all for suspecting a particular individual, so long as they do not "convey the message that compliance with their requests is required" (501 U.S. at 435, 439). The Seventh Circuit's conclusion that a safety plan form that accurately conveys the message that compliance is voluntary and that refusal "may" result in removal does not, standing alone, vitiate consent (Pet. 16a) is thus consistent with *Bostick* and *Robinette*, unlike the Class's proposed *per se* rule.

The Class also overstates its other authorities on coercion, none of which is apposite here. Pet. 24. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), does *not* stand for the proposition that "a threat of serious harm may be a 'circumstance' that, *by itself*, vitiates the voluntariness of agreement," as the Class contends. Pet. 24 (emphasis added). In fact, *Schneckloth* stands for the opposite proposition: no single criterion is controlling when determining voluntariness. 412 U.S. at 224-26. And critically, *Schneckloth* distinguished between consent by those who are in their "own familiar territory," as parents likely are when a safety plan is discussed, and consent when one is in custody, which is inherently coercive and thus requires a different test for consent. *Id.* at 248-49. *D.H. Overmeyer Co.* rejected a due process challenge to Ohio's confession-of-judgment statute, which required waiving a constitutional right in return for a benefit, but commented that unspecified "legal consequences may ensue" under certain conditions, none of which

exists here. 405 U.S. at 188. *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963), held only that a confession was involuntary because, among other things, the arrestee was told that state aid for her infant children would be cut off and her children taken from her while she spent ten years in prison, while encircled in her apartment by three police officers and a twice-convicted felon who had "set her up." None of these cases conflicts with the Seventh Circuit's decision that a mere safety plan offer, standing alone and containing truthful language about the possible consequences of refusal, is not *per se* coercive.

In the end, even if *some* class members' agreement were in fact unconstitutionally coerced under the totality of their own individual circumstances, that would at best entitle such individuals to relief. And although only very few parties appear to have brought such claims, those that have were unsuccessful. The DeLaFonts' suit was rejected by a jury (*DeLaFont*, No. 02-5448 (N.D. Ill. Dec. 1, 2005)), and the smattering of similar individual suits brought around the country in the last dozen years likewise failed (*see, e.g.*, *Smith v. Williams-Ash*, ___ F.3d ___, 2008 WL 782453 (6th Cir., March 26, 2008); *Terry v. Richardson*, 346 F.3d 781 (7th Cir. 2003); *Gottlieb v. County of Orange*, 84 F.3d 511 (9th Cir. 1996)).

IV. The Seventh Circuit's Holding That No Hearing Is Required Absent Evidence of a Deprivation of a Constitutionally Protected Interest Is Consistent With the Court's Procedural Due Process Jurisprudence.

The Class admits, as it must, that the Seventh Circuit correctly held that a hearing is required only for the deprivation of a constitutionally protected right (Pet. 26), but then contends that the Seventh Circuit purportedly misstated the Class's procedural argument, which they say sought only post- (not pre-) deprivation hearings to contest safety plans (Pet. 26-28). Whether the Seventh Circuit misinterpreted the Class's litigation position is, of course, not a question warranting this Court's review. But the Class's argument appears disingenuous in any event — the district court later *ordered* review upon request within ten working days (Pet. 27a), yet the Class was dissatisfied with this result. The district court's later order (Pet. 26a-28a), which required the Department to incorporate certain procedural safeguards after the preliminary injunction hearing, is ignored by amici too. See, e.g., Psychoanalytic 22 (stating that parents forfeit the right to challenge the safety plan by agreeing to it); Cato 9-21 (stating that no procedure exists for contesting safety plans); Fathers 22-24. Meanwhile, other amici press for a pre-deprivation hearing. Bar Ass'n. 2.

The Class and its amici demand that acceptance of a safety plan offer, standing alone, requires the same "robust set of procedural rights" for ensuring that acceptance of a plea agreement is voluntary. Pet. 27-28; Bar Assn. 4, 18-21. As indicated above, however, to

forever relinquish the right to a trial by one's peers is fundamentally different from agreeing to a safety plan: a parent may unilaterally refuse or withdraw acceptance of a safety plan at any time. That no hearing is needed to determine whether acceptance of the plan is voluntary was handily demonstrated by the Class's own evidence: one class member unilaterally stopped complying with her safety plan after two weeks (Pet. 57a), and the Department never claimed that she waived her right to do so by agreeing to the plan initially. This was compelling evidence that no hearing is required to determine whether a safety plan is voluntary: when parents no longer agree, they have the right to just stop complying (or sue for declaratory relief, as *MedImmune* teaches). And although the Class finds significant that respondent did not present evidence of parents refusing safety plans, respondent had no evidentiary burden here, unlike the Class, which presented no evidence that anyone who did agree at one time but reneged was told they had waived their right to challenge the safety plan by agreeing to it in the first place.

Perhaps the larger problem with the Class's procedural due process argument is its apparent belief that the Department is the only source for the hearing it demands. See also Fathers 22-24. In fact, as the Seventh Circuit instructed in *Terry*, Illinois law already provides procedures to challenge an investigator's authority to limit or prohibit a parent's contact with a child during an investigation. 346 F.3d at 787. These procedural vehicles include actions for mandamus relief (735 ILCS 5/14-101 (2006)) or declaratory judgment (735 ILCS 5/2-701 (2006)). And although the Class and its amici seem to believe that

the Department itself had to provide (or initiate) the hearing, they offer no support for that view, which appears to conflict with *MedImmune* (127 S. Ct. at 773) and *Gottlieb* (84 F.3d at 521) in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

What You Need to Know about a Child Abuse or Neglect Investigation

www.state.il.us/dcfs

Introduction

The purpose of this booklet is to provide information concerning the Department of Children and Family Services (DCFS), the Child Abuse Hotline and the child abuse and neglect investigation process. DCFS is mandated by Illinois law to maintain a 24 hour hotline to receive reports from the public and mandated professionals concerning alleged incidents of child abuse and neglect involving Illinois children. Reports taken at the hotline are forwarded to a Department field office nearest the alleged child's home for investigation.

The Department's focus during the course of all child abuse and neglect investigations is the safety of the child victims of the alleged child abuse or neglect. Child abuse and neglect investigations are initiated within 24-hours after the report is taken at the hotline by initiating contact with the alleged child victims or observation of the child's environment if the allegation is one of inadequate shelter or environmental neglect.

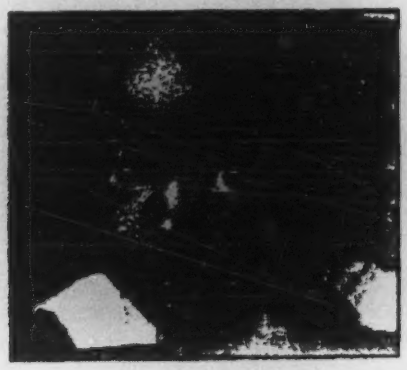
When a child is believed to be at immediate danger of harm, the investigation will be initiated without delay. DCFS has up to 60 days to complete an investigation and make a final determination. However, 30-day extensions can be granted for good cause. The Department notifies the alleged

perpetrator and the child's caretakers in writing of the Department's final finding within 10 days after the final determination is entered into the State Central Register. If the allegation is indicated, the notification also provides the perpetrator with instructions on how to request an appeal and receive an administrative hearing before an impartial Administrative Law Judge. The DCFS Director will issue a final administrative decision within 90 days of the receipt of a timely and sufficient request for an appeal, unless extended by an action of the

person filing the appeal or a stay pending a final judicial determination of a criminal or juvenile court proceeding based upon the same set of facts.

These topics are discussed in greater detail throughout this booklet. Information concerning child abuse and

neglect investigations and administrative appeals can be accessed through the Department's web site, www.state.il.us/dcfs.



Overview of Child Abuse and Neglect Investigations

What is the Child Abuse Hotline?

Child welfare professionals staff the Department's child abuse hotline 24 hours per day, seven days per week, 365 days per year to receive and assess reported information of suspected child abuse and neglect. Information meeting the criteria for a report of abuse or neglect is taken and forwarded to the appropriate Department field office for investigation. The toll free number for the hotline is 1-800-25ABUSE (252-2873).

Who can call the Child Abuse Hotline?

Anyone can make a report to the DCFS child abuse

hotline. However, certain professionals, such as doctors, nurses, teachers, childcare center staff and social workers are mandated reporters. Mandated reporters are required to call the child abuse hotline and make a report if they have reason to believe that a child known to them in their professional capacity may be abused or neglected. Mandated reporters may suffer severe penalties, such as the loss of a professional license or criminal charges, if they fail to report suspected child abuse or neglect.

What happens during the investigation?

After the child welfare professional at the hotline determines there is enough information to take a report, the case is assigned to a trained investigative specialist. The investigative specialist is required by law to initiate the report by seeing the alleged child victims within 24 hours from the time the report is received. If the allegation is one of inadequate shelter or environmental neglect, the investigative specialist will initiate the report by viewing the child's living environment. During this initial contact and throughout the investigation, the investigative specialist's primary concern is the immediate safety of the alleged

child victims. If necessary, the investigative specialist will develop a safety plan with the family to maintain the safety of the children during the course of the child abuse and neglect investigation

The investigative specialist will interview the alleged child victims and other children in the household, alleged perpetrators, parents, caretakers, other members of the household, extended family members and various other professionals, depending on the specific allegation of abuse or neglect. If you or members of your family are involved in an investigation, you should provide full and complete information to the investigative specialist who will ask you and your family members questions about the alleged incident and the home environment. You and your family members should provide the investigative specialist with the names and contact information of any witnesses, neighbors, friends, family members, relatives or professionals who has first hand knowledge of the alleged incident and who you wish the investigative specialist to contact during the

investigation.

State law requires that the investigative specialist notify the police and the local State's Attorney of all serious allegations of child abuse and neglect, such as those that allege serious physical injury or sexual abuse to a child. The police and the Department may conduct a joint investigation, or the police may conduct their own investigation. The investigative specialist may also need to contact the police if individuals refuse to cooperate with the investigation.

The investigative specialist is required to gather all available information during the course of the investigation. This includes information tending to show that a person is responsible for committing child abuse and/or neglect as well as information tending to show that person is not responsible for committing child abuse and/or neglect. Once all of the available information has been gathered, the investigative specialist, in conjunction with a supervisor, will make a final finding in the case. There are two final finding decisions that can result from an investigation. A report can be "unfounded" or "indicated." When a report is unfounded, it means that the investigative specialist did not find credible evidence that a child was abused or neglect. When a report is indicated, it means that the investigative specialist found credible evidence that a child was abused or neglected. "Credible evidence" means that the available facts when viewed in light of surrounding circumstances would cause a reasonable person to believe that a child was abused or neglected.

How long does an investigation last?

Under state law, the Department has 60 days to complete a child abuse and neglect investigation. Most child abuse and neglect investigations are completed within 30 days. The Department may seek an extension of the 60 day requirement for good cause. Examples of good cause include a pending police investigation or obtaining reports from medical professionals.

How do I find out the results of the investigation?

You will be notified in writing by the Department of the final finding of the Department's investigation and the investigative specialist will contact you in person to advise you of the results of the investigation and the reason for the final finding. It is important that you keep the ir vestigative specialist informed of your current home address and other personal contact information so that the investigative specialist can make sure that the most up to date information is contained in the investigation file.

The final findings of child abuse and neglect investigations are maintained on the Department's State Central Register. The State Central Register is a confidential list of persons who have been found to be indicated perpetrators of child abuse and/or neglect. Information maintained on the Department's State Central Register is confidential and not open to the general public. However, state law requires that various employers such as day care centers, some

schools and other facilities where people work directly with children, conduct a background check on potential employees or volunteers to determine if the person has been indicated for child abuse and/or neglect as part of the employment process.

If the investigation is unfounded, the Department's State Central Register will maintain the information for a period of time from 60 days up to three years, depending on the nature of the allegation. After the designated time period, the record of the investigation will be removed from the State Central Register. A person who has been the subject of an unfounded report may request in writing that the Department retain a record of the investigation for harassment purposes.

If the investigation is indicated, the report will be maintained on the Department's State Central Register for a period of time from five years to 50 years, depending on the specific allegation that is indicated.

What can I do if I have been indicated for child abuse or neglect?

Persons who have been indicted for child abuse and/or neglect have certain rights. These rights include:

1. The right to receive a copy of the investigative file, absent certain information that the Department is prohibited from releasing by law
2. The right to request an administrative appeal hearing of the indicated finding, which includes the right to a hearing at which the indicated

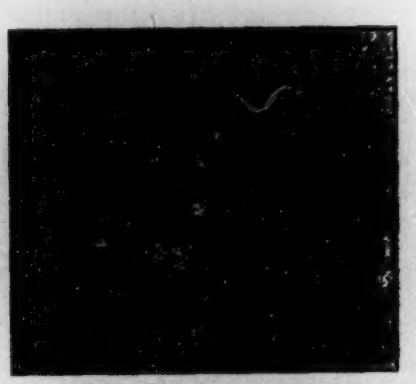
perpetrator and the Department can present testimony and other evidence before a neutral Administrative Law Judge who make a recommended finding to the DCFS Director

3. The right to see judicial review of the Director's final administrative decision after an administrative appeal hearing

Can DCFS remove my children from my care during an investigation?

The Department's main focus during the investigative process is to assure the safety and protection of children. The Department attempts to assure the safety of children in a variety of ways during the investigation. If the investigative specialist determines that children are unsafe but may be maintained in their home with a safety plan, the investigation specialist will explain the reason for the safety plan and develop a safety plan with the family that can keep children safe during the investigation.

State law permits an investigative specialist to take temporary protective custody of a child without the consent of the person responsible for the child's welfare only if there is reason to believe that the child is in immediate danger and there is not time to file a petition in court. Before a child is taken into protective custody, the investigative specialist will consider whether there are other means available, such as a safety plan or assistance in locating and securing housing, which could avoid the need for the child to be removed from the home. A hearing before a judge will be held within 48 hours, excluding weekends and holidays, of a child being taken into protective custody.



What is a safety plan?

During the course of a child abuse and neglect investigation, the Department is mandated by law to assess the safety of any alleged child victim and other potential victims and to take appropriate steps to insure the safety of those children. Department staff will work with the children's caretakers and other family members to develop strategies to maintain the safety of children during the course of an investigation. One method by which the Department attempts to insure the safety of children is to develop a safety plan with the children's caretakers and other family members. A safety plan is a temporary, short-term plan designed to control serious and immediate threats to children's safety. Safety plans can take a variety of forms and are developed with the input and voluntary consent of the children's caretakers and other family members. During the course of the child abuse and neglect investigation, the children's safety will continually be reassessed as will the continued need for the safety plan.

After the investigative specialist has completed a safety assessment on the alleged child victim and any other potential victims, they will discuss the need for

any safety interventions with the children's caretakers and/or family members. The investigation specialist will provide the children's caretakers with a copy of the completed safety assessment and will also explain the reasons they believe the safety plan is necessary. The investigative specialist will also discuss the need for safety interventions with the children's caretakers and other family members.

Safety plans can take a variety of forms and the family's input is essential in developing a plan. Safety plans can include asking a caretaker and/or children to live in another location during the course of an investigation, asking a caretaker and/or children to have supervised contact with children or asking another family member to move into the home during the investigation to supervise contact with the children. The specific requirements of each safety plan will depend on the individual circumstances of the investigation and the specific needs and circumstances of the family situation. The investigative specialist will provide the family with a written copy of the safety plan. The investigative specialist will monitor and reassess the safety issues on a weekly basis.

What will happen if my child is removed from my care?

Whenever a child is taken into temporary protective custody, the investigative specialist is required to notify the child's parents of the reasons for the child's removal from their home. Within 48 hours of the child being taken into temporary protective custody,

a shelter care hearing or temporary custody hearing is held in juvenile court. The purpose of the hearing is for a judge to determine whether the child is in need of protection. Parents will be provided with written notification of the date and time of the scheduled court hearing and should make every attempt to attend the court hearing. The judge will listen to the testimony at the hearing and make a decision whether to return the child to his or her parents or to order the Depart-ment to serve as the child's temporary custodian. The Department will attempt to provide services to the child and the child's parents to address the reasons that the case was brought into court and any other family issues.

What happens if the court does not return my children to my care at the first hearing?

In the event that the judge orders the Department to

serve as the children's guardian, the Department will assign the family a caseworker who will attempt to address the issues that brought the family to the Department's and the court's attention as well as any other family issues. The caseworker will work with the family to provide services to address the family's needs and the court will schedule court hearings to hear about the family's progress. Further information regarding the court process will be provided in the even that a child is removed from their parents and/or caretaker's physical custody.

Can I found out who called in the report to the hotline?

By law, DCFS cannot release the name of the person who made the report to the hotline or the names of other persons who cooperated in the investigation. Limited exceptions are described in the Department's administrative rules, which are contained on the DCFS Web site.

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In The
Supreme Court of the United States

BELINDA DUPUY, et al.,

Petitioners,

v.

ERWIN McEWEN, Director,
Illinois Department of Children and Family Services,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

Petitioners (the "parents") seek certiorari to challenge two policies that DCFS follows with respect to its practice of imposing "safety plans" under threats that refusing to accept them may result in their children being taken into state custody and placed into foster care: (1) that DCFS does not require reasonable suspicion of abuse or neglect before imposing such plans; and (2) that DCFS does not provide any procedures for parents to challenge safety plans once they are imposed. Pet. for Cert. i. The parents seek an injunction ordering DCFS to adopt constitutionally sufficient procedures; they do not seek damages.

DCFS did not dispute the existence of these policies in either the district court or in the Seventh Circuit; there were no disputed issues of fact in the Seventh Circuit and there are none here. Nor does DCFS deny here that it follows each of the policies at issue. DCFS's undisputed policies authorize state investigators to impose safety plans on the basis of no more than an allegation of abuse or neglect and without any evidence supporting that allegation. Pet. App. 34a-40a. (DCFS's assertion that permissible reasons for an investigator's implementing a safety plan "include" reasonable suspicion that a member of the household poses a threat to the child (Br. in Opp'n 5 n.1) is simply another way of saying that DCFS does not *require* such suspicion.) And DCFS's undisputed policies provide that families who accede to the plans in order to avoid the risk of foster care are afforded no procedures to challenge DCFS's decision to deem the child in need of such a plan. Pet. App. 44a, 49a.

Nonetheless, DCFS attempts to divert attention from its policies and practices by portraying the parents' challenge to the Seventh Circuit's decision as a complaint about factual and evidentiary

matters. Br. in Opp'n i, 1, 2-3, 11-18, 20, 23, 34. More specifically, DCFS claims that the constitutionality of its two policies is not really at issue because petitioners failed to present evidence that investigators "*systematically* lack[] sufficient evidence to create reasonable suspicion of abuse when threatening to remove a child to obtain agreement to safety plans." Br. in Opp'n 3 (emphasis added).

DCFS's argument misses the mark. The parents' lawsuit challenges *policies* that: (1) fail to require its investigators to have a reasonable suspicion of abuse before requiring parents to choose between accepting a safety plan and risking foster care; and (2) provide no neutral review of such plans once DCFS imposes them. And this petition for certiorari challenges the Seventh Circuit's holding that no such suspicion is required because parents' assent to such plans is, by definition, voluntary. Pet. App. 15a. When DCFS lacks reasonable suspicion, the Seventh Circuit reasoned, parents have "only to thumb their nose" at the investigator's threat, just as a guest at a cocktail party might reject a martini in favor of a manhattan, *id.* at 15a-16a. Accordingly, to the extent DCFS now demands individualized showings that each member of the class has been harmed by its scheme, the time for such complaints has long passed. The district court certified a plaintiff class of individuals who have been or will be required by DCFS "under threat of protective custody" to submit to a safety plan and it found DCFS's policies irreparably injure families. Pet. for Cert. iii; Pet. App. 97a-99a. DCFS did not appeal that ruling, so parents may challenge the Department's policies without the need for everyone to submit particularized evidence.

Once this case is brought back into focus, the need for certiorari becomes clear. Notwithstanding DCFS's protestations, the Seventh Circuit's holding creates a conflict with the Third Circuit's decision in

Croft v. Westmoreland County Children & Youth Servs., 103 F.3d 1123 (3rd Cir. 1997), and contravenes this Court's precedents. The Seventh Circuit's holding also forms the predicate for its additional erroneous conclusion that "no hearing of any kind is necessary" once a safety plan is imposed (Pet. App. 15a) – a conclusion that also conflicts with this Court's precedents. Certiorari should be granted to resolve these extremely important legal issues that affect thousands of families in Illinois alone. Pet. App. 40a. *See Illinois State Bar Ass'n* Brief as Amicus Curiae in Support of Petitioners at 2 (noting other states with similar safety plan policies).

1. In *Croft*, the Third Circuit held that "a state has no interest in protecting children from their parents" – and thus cannot offer a safety plan on pain of removing children from their homes – "unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." 103 F.3d at 1126. DCFS argues that the Seventh Circuit's decision is consistent with *Croft* because: (a) the investigator there lacked legal authority to threaten removal of the child; and (b) the investigator there threatened "certain removal" instead of merely possible removal. Br. in Opp'n 16-19. Neither of these purported distinctions withstands scrutiny.

First, the constitutional issue here – namely, the level of suspicion required before implementing a safety plan – does not turn in any way on whether investigators have legal authority under state law to impose safety plans. Just as violating a state law does not violate the federal Constitution, *see, e.g., Virginia v. Moore*, 128 S. Ct. 1598 (2008), *conforming* to state law or policy does not transform an unconstitutional action into a constitutional one.[1]

[1] Even if the content of state law made a constitutional difference, Illinois law is materially no different from the

Accordingly, the only issue here is the constitutional question of whether imposing safety plans without reasonable suspicion[2] (and under DCFS's other policies and procedures) violates the Due Process Clause.

Second, DCFS is wrong that this case differs from *Croft* in that state investigators here merely "offer" safety plans "without the threat of the child's certain removal." Br. in Opp'n 19. Although state investigators ordinarily give parents forms stating that if parents reject safety plans the investigators "may" remove their children, Pet. App. 16a, the district court found, and neither DCFS nor the Seventh Circuit disputed, that in light of investigators' actual behavior in presenting safety

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state law at issue in *Croft*. Both require reasonable suspicion before the state may take custody of a child. *Compare Croft*, 103 F.3d at 1126 (citing 42 PA. CONS. STAT. § 6324 and 23 PA. CONS. STAT. § 6315 as "providing for removing child from home only where there are reasonable grounds to believe the child suffers from injury, or is in imminent danger of injury from her surroundings"), *with* Pet. App. 15a (noting that under Illinois law, "mere suspicion ... is not a statutory ground for removing a child from his parents' custody").

[2] DCFS insinuates at certain points that its policies, at least as applied to certain class members, conform to the reasonable suspicion standard. Br. in Opp'n 3-4, 16-17. But DCFS has never disputed that it policies authorize it to act with far less than reasonable suspicion. Furthermore, the bases for DCFS's actions here are, in all relevant respects, identical to those deemed constitutionally inadequate in *Croft*, including multi-level hearsay, uncorroborated and anonymous allegations, and investigators' admissions that they impose safety plans without any belief that abuse occurred. *Compare Croft*, 103 F.3d at 1126-27 *with* Pet. App. 53a (multilevel and anonymous hearsay); *id.* at 67a-68a (anonymous and uncorroborated allegations); and *id.* at 36a-37a (safety factors warranting imposition of safety plans may be found "based solely on an allegation of abuse or neglect, even if no investigation has yet occurred or if an investigation suggests that the allegation may be untrue"). In any event, the due process challenge here does not depend on whether any individual safety plan would be upheld under constitutional policies and procedures.

plans "all class members were threatened that their children would be placed in protective custody if they refused to accept a safety plan." Pet App. 86a; *accord* Pet. App. 89a; Pet. for Cert. 7-8 (providing examples). Indeed, the plaintiff class here is explicitly defined as individuals who have been or will be required by DCFS "under threat of protective custody" to submit to a safety plan. Pet. for Cert. iii. In other words, the parents do not claim – as DCFS repeatedly says (Br. in Opp'n 9, 12, 16, 19, 22) – that "a mere safety plan offer, standing alone" is "*per se* unconstitutional." The "offers" that parents challenge in this case do not "stand alone."[3]

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[3] DCFS says that "the Department procedures to which class members testified below have been amended, meaning much of the factual evidence on which the district court relied is no longer meaningful, for the only relevant practices are the Department's current ones in a case seeking only injunctive relief," Br. in Opp'n 3; *see also id.* at 8. This claim ignores the record in this case. Although DCFS adopted some modest amendments to its challenged policies in August 2002, those amendments did not modify its policies and procedures of threatening parents with removal of their children if they do not agree to safety plans while providing no procedures for review. Pet. App. 42a-43a. Moreover, although the amendments DCFS now relies on were instituted *before* the trial, DCFS has never argued that these amendments worked a constitutionally significant change to its policies, which continue in force. Nor did the district court suggest, in its March 2005 opinion finding that DCFS consistently threatens parents into accepting safety plans, Pet. App. 86a, 89a, 93a, that the amendments had any impact on its findings of fact – findings DCFS did not appeal.

If DCFS is suggesting that the parents' claims have become moot because amended DCFS procedures forbid investigators from threatening parents (Br. in Opp'n 3, 8, 15), this suggestion is without merit. The district court's opinion was issued in March 2005, and DCFS did not then or thereafter suggest that this case had become moot. In any event, "it is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528

2. The Seventh Circuit's decision allowing DCFS to impose safety plans based on hunches that fall short of reasonable suspicion (Pet. App.15a) also contravenes this Court's precedents.

DCFS does not dispute that parents have a fundamental liberty interest in directing "the care, custody and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2001). It also is well established that state interference with that interest need not rise to the level of the state's direct removal of a child from a parent to be unconstitutional. *Id.* (invalidating a statute allowing any person to petition for visitation rights against parents' wishes). DCFS nonetheless contends that it can impose safety plans without reasonable suspicion of wrongdoing – the minimum level of suspicion ordinarily required to impair a fundamental liberty interest – because "a parent always has the right to refuse a safety plan offer." Br. in Opp'n 21. But this Court made clear in *Quilloin v. Walcott*, 434 U.S. 246 (1978), that parents have a fundamental liberty interest against more than just unilaterally forced familial separations. A state must have some evidence of unfitness even to "*attempt* to force the breakup of a natural family." *Id.* at 255 (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in judgment)) (emphasis added). Yet the entire point of safety plans is to interfere with parents' care, custody, and control over their children — otherwise DCFS would not impose them. Once that reality is clear, it follows that DCFS's policy of

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U.S. 167, 189 (2000) (quoting *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Only if "subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur" may a case "become moot by the defendant's voluntary conduct," *id.* DCFS has not sought to make any such showing, and even if it had materially changed its ways that would not suffice, for nothing currently prevents it from resuming its prior practices.

allowing investigators to impose safety plans based upon mere "inarticulable hunches" is unconstitutional. *See Parham v. J. R., 442 U.S 584, 603* (1979) ("The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding that a law prohibiting the teaching of German unconstitutionally impairs "the power of parents to control the education of their own [children]").

3. DCFS suggests that the parents' claims of unconstitutional coercion fail because they did not present "class-wide" evidence that DCFS investigators secured safety plans through misrepresentations or other "improper means." Br. in Opp'n 23. But the parents were unable to prove coercion on remand only because the Seventh Circuit held that threatening to take children into custody without reasonable suspicion of abuse or neglect was not an "illegal" or otherwise independently "improper means" of interfering with parents' care, custody, or control over their children. Pet. App. 3a, 15a, 19a. The parents' challenge precisely *that* holding, which presents a pure legal question that does not depend on any individualized evidence.

DCFS's demands for evidence that *each* class member suffered "improper coercion,"[4] along with its revised Question Presented (Br. in Opp'n i), do not even address that question. Moreover, the Seventh Circuit's position that threatening removal of children is not improper (Pet. App. 2a, 3a, 15a, 19a)

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[4] Individualized factual questions as to whether particular investigators improperly coerced parents into waiving their due process rights by threatening removal of their children would arise only if DCFS had a policy that forbade investigators from making such threats absent reasonable suspicion. Since DCFS has no such policy, its arguments about what constitutes such coercion (Br. in Opp'n 23-28) are irrelevant.

flies in the face of this Court's decisions which hold that a state "may not impose conditions [on the grant of a privilege] which require the relinquishment of constitutional rights." *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 593-94 (1926); *Steffel v. Thompson*, 415 U.S. 452 (1974); *Terrace v. Thompson*, 263 U.S. 197 (1923), discussed in Pet. for Cert. 21-23. DCFS strains to distinguish *Frost* as a case about unconstitutional conditions, not coercion. Br. in Opp'n 27. But this is a distinction without a difference: the issue is whether and how the government can pressure individuals to give up their constitutional rights.

DCFS's reliance on *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), is misplaced. In *Wilkie*, the government had a legitimate basis for coercive actions. *Id.* at 2601-02. In contrast, DCFS lacks such an interest. *See Santosky v. Kramer*, 455 U.S. 745, 767 (1982) (a state has no interest in separating "children from the custody of fit parents") (quoting *Stanley v. Illinois*, 405 U.S. 645, 652 (1972)).

4. DCFS's argument that the parents are not entitled to post-deprivation process likewise fails. DCFS mischaracterizes the parents' claim as one for the same "robust set of procedural rights" that are required to ensure that a guilty plea is voluntary. Br. in Opp'n 33-34. Petitioners, however, discuss those protections only to illustrate the flaws in the Seventh Circuit's analogy between safety plans and plea bargains. Pet. App. 14a; Pet. for Cert. 27-28. Petitioners have consistently requested timely *post*-deprivation procedures.

Finally, DCFS claim that various types of potential state court proceedings – principally individual declaratory judgment actions – provide adequate process for parents who have acceded to safety plans. Br. in Opp'n 34-35. But DCFS has never raised this argument before: it never has suggested that such proceedings offer an adequate

form of class-wide relief, not even when the district court, in its March 2005 opinion, solicited DCFS's views as to appropriate post-deprivation procedures, *see* Pet. App. 100a. Moreover, state court procedures like individual declaratory judgment actions come with no guarantee of timely adjudication, making them entirely inappropriate for parents suffering ongoing deprivations of their parental rights.[5] In any event, the only question at issue here is whether the Seventh Circuit properly held that "no hearing of any kind is necessary." Pet. App. 16a. If this Court reverses that ruling (as it should), then DCFS could argue on remand that these state court proceedings supply adequate process and that DCFS has not waived its ability to so argue.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, the writ should be granted.

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[5] In contrast, in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 S. Ct. 764, 772-73, 775 (2007), upon which DCFS relies (Br. in Opp'n 27, 35), this Court approved a declaratory judgment action because doing so permitted the plaintiff to *avoid* the injuries with which it was threatened, money damages and the loss of a good part of its business.

Respectfully submitted,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN COALITION FOR FATHERS AND CHILDREN; CHILDREN'S LAW CENTER OF MINNESOTA; THE CIVITAS CHILDLAW CENTER OF THE LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW; FATHERS4JUSTICE; JUVENILE LAW CENTER; THE LEGAL ASSISTANCE FOUNDATION OF METROPOLITAN CHICAGO AND THE SUPPORT CENTER FOR CHILD ADVOCATES IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici consist of seven non-profit organizations that serve low-income individuals and families or represent parents and children in child protection and related cases. *Amici* include the American Coalition for Fathers and Children, Children's Law Center of Minnesota, the Civitas ChildLaw Center of the Loyola University Chicago School of Law, Fathers4Justice, the Juvenile Law Center, the Legal Assistance Foundation of Metropolitan Chicago, and the Support Center for Child Advocates. A more detailed statement of *amici* interest is provided in the Appendix.

SUMMARY OF THE ARGUMENT

The Illinois Department of Children & Family Services ("DCFS") gives as many as 10,000 Illinois families each year what amounts to an offer they can't refuse: a so-called "safety plan" by which the State restricts the most fundamental aspects of the relationship between parents and their children. Such safety plans are implemented on the basis of what the Seventh Circuit aptly described as an "inarticulable hunch" that falls far short of even reasonable grounds,

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[1] Counsel of record for all parties were timely notified of the intent to file this brief and have consented to its filing. Copies of the consent letters are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel, made a monetary contribution to its preparation or submission.

much less probable cause, to believe that the children whose safety is supposedly being protected are actually at risk. Based on anonymous or otherwise unreliable reports, those hunches are usually unfounded, as nearly two-thirds of DCFS investigations result in a finding that there is no credible evidence of abuse or neglect. Yet those hunches provide the putative justification for imposing safety plans of indeterminate length that, in practice, may stay in force for extended periods of time—during which parents may be banished from the family home, children may be sent to live elsewhere, parents and children may be forbidden from seeing each other, or all contact between parents and children may be supervised or subject to other onerous conditions.

This unprecedented and unwarranted intrusion by the State into the relationship between parents and children is implemented in an inherently coercive manner. Indeed, despite subjecting as many as 10,000 families each year to safety plans, DCFS has been unable to provide evidence of even a single instance where a safety plan "suggested" by DCFS has been rejected by the parents. Under these circumstances, the linchpin of the Seventh Circuit's conclusion that safety plans do not implicate Due Process rights—that such plans are voluntary—conflicts with both the decision of at least one other circuit regarding constitutional protections applicable to the imposition of safety plans, *Croft v. Westmoreland County Children & Youth Svcs.*, 103 F.3d 1123 (3d Cir. 1997), and legal principles articulated by this Court governing waiver of constitutional rights as well as limits on the State's power to disrupt the relationship between parents and children.

Although this Court has addressed other aspects of the State's interference with the relationship between parents and children, until now it has never had occasion to articulate the constitutional limitations governing the use of so-called "voluntary separation agreements" such as safety plans. Moreover, while the Court has hinted in dicta that children have constitutionally protected rights to the care, custody, and companionship of their parents, it has never squarely addressed that issue. The *amici* respectfully urge the Court to grant the writ of certiorari and use this case as a vehicle to provide Illinois and the rest of the nation with much-needed guidance regarding safety plan-type programs, to resolve the circuit split occasioned by the decision below, to eliminate the inconsistency between that decision and fundamental principles previously established by this Court, and to recognize children's fundamental liberty interest in their relationship with their parents.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO REAFFIRM THE IMPORTANCE OF THE FUNDAMENTAL RIGHTS INHERENT IN THE FAMILY RELATIONSHIP AND PROTECTED UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

The *Fourteenth Amendment's* Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." While the Due Process Clause affords certain procedural safeguards, it "guarantees more than fair process." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). This

Court has long recognized that it contains a "substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting *Washington*, 521 U.S. at 720). It "forbids the [State] to infringe fundamental liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington*, 521 U.S. at 721 (internal quotation omitted).

For nearly a century, the family relationship has been regarded as a fundamental liberty interest and afforded substantive due process protection. Indeed, the inherent nature of the family relationship has given rise to several separate yet interrelated liberty interests, including the right to "establish a home and bring up children," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), the "freedom of personal choice in matters of . . . family life," *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974), and the liberty interest in maintaining the integrity of the parent-child relationship, *Lehr v. Robertson*, 463 U.S. 248, 258 (1983).

Substantive due process protects the family from undue State intrusion because there is a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). This "Court has examined closely and contextually the importance of the government interest advanced in defense of the intrusion," *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996), and the "usual deference to the [State] is inappropriate." *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977).

At stake in this case are three separate but related fundamental rights arising out of the family relationship. First, the family has a fundamental right to maintain its integrity. Second, a parent has the fundamental right to the care, custody, and companionship of his or her child. Third, a child has the reciprocal fundamental right to his or her parent's care, custody and companionship. These interrelated liberty interests are deeply rooted in our Nation's history and jurisprudence, and fall within the ambit of substantive due process protection. *See Hodgson v. Minnesota*, 497 U.S. 417, 444-48 (1990) (citing cases).

A. The Fundamental Right to Maintain Family Integrity is Protected by Substantive Due Process and Must Be Balanced Against the State's Compelling Interest to Protect Children.

The family has the substantive right to maintain its integrity. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Substantive due process "protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore*, 431 U.S. at 503. The family is the foundation of our society—"the most fundamental social institution." *Trimble v. Gordon*, 430 U.S. 762, 769 (1977). Its importance "stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . ." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972)). Beyond this simple reason for recognizing

the right to family integrity, this Court has repeatedly held that matters involving family life are private which substantive due process shields from undue State interference. *See Moore*, 431 U.S. at 502; *M.L.B.*, 519 U.S. at 116; *Hodgson*, 497 U.S. at 446.

Because of the family's right to maintain its integrity, the State may only infringe this right to achieve a compelling interest. Substantive due process demands "particularly careful scrutiny of the state needs asserted to justify [the] abridgment" of family rights. *Moore*, 431 U.S. at 502 (internal quotation omitted). Where the State infringes upon the private choices "concerning the arrangement of the household, this Court has carefully examined the governmental interests advanced and the extent to which they are served by the challenged [State action]." *Hodgson*, 497 U.S. at 447 (internal quotation omitted).

Unquestionably, the State has a compelling interest to protect children from abuse and neglect. To achieve its goal, the State may have to remove a child from the custody of an abusive parent. Nevertheless, the State's compelling interest to protect children must be balanced against the family's substantive rights. *Croft*, 103 F.3d at 1125; *Darryl H. v. Coler*, 801 F.2d 893, 901 n.7 (7th Cir. 1986). While the family's right is not absolute, neither is the State's power to intrude on the family in the name of child protection. As the Third Circuit held in *Croft*, the State has "no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." 103 F.3d at 1126 (citing *Lehr*, 463 U.S. at 258).

The State carries the burden of gathering sufficient evidence that a parent is abusing or neglecting a child *before* it may take steps to infringe upon the family's substantive rights. *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000); *Croft*, 103 F.3d at 1125.

B. Parents Have The Fundamental Right to the Care, Custody and Companionship of Their Children That the State Cannot Infringe Absent Evidence That the Parent is Unfit.

One of the "oldest fundamental liberty interests" recognized by this Court is the "interest of parents in the care, custody, and control of their children." *Troxel*, 530 U.S. at 65. This Court in *Parham v. J.R.*, 442 U.S. 584 (1979), articulated the rationale for recognizing a parent's fundamental right:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . .

442 U.S. at 602 (internal quotations and citations omitted). A parent who has "demonstrated sufficient commitment to his or her children is . . . entitled to raise the child free from undue state interference,"

Hodgson, 497 U.S. at 447, and to the presumption that he or she acts in the best interest of that child. *Troxel*, 530 U.S. at 68-69.

A parent's right to raise his or her child without State interference is limited by the State's *parens patriae* interest in ensuring the child's welfare and safety. *Prince*, 321 U.S. at 166-67; *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). Where necessary, this interest gives the State authority to assume the parent's role and decide what is in the child's best interest. However, the State must first rebut the presumption that the parent acts in the best interest of his or her child before invoking its *parens patriae* interest. As Justice Stewart reasoned in *Smith*:

> [I]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the state cannot enter."

431 U.S. at 862-63 (Stewart, J., concurring) (quoting *Prince*, 321 U.S. at 166). Additionally, State action that needlessly or erroneously separates a parent from his or her child falls far from achieving any *parens patriae* interest, and is unconstitutional. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 47-48 (1981); *see also Parham*, 442 U.S. at 603 ("[T]he statist notion that governmental power should supersede parental authority in all cases

because some parents abuse and neglect children is repugnant to American tradition."). State action premised solely on protecting the child, absent establishing that the parent is unfit, offends substantive due process.

C. Children Have the Reciprocal Substantive Right to Their Parent's Care, Custody and Companionship That is Infringed When the State Unjustifiably Intrudes Upon the Family Relationship.

This Court has held that children possess certain fundamental rights that the State cannot infringe. *See Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969); *In re Gault*, 387 U.S. 1, 13 (1967); *Haley v. Ohio*, 332 U.S. 596, 601 (1948). While this Court has never held that a child has the substantive right to the care, custody and companionship of his or her parent, *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (reserving question), it stands to reason that such a right exists. Moreover, the Court has never squarely addressed the implication to a child's substantive rights when the State impermissibly interferes in the private realm of family life.

This Court should hold that in the family context, the child—like the parent—has substantive rights that protect against unwarranted State action. The child's substantive right is simply the reciprocal of the parent's fundamental right to care for the child. *See Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 1999) ("The right to family association includes the right of parents to

make important . . . decisions for their children, and of children to have those decisions made by their parents rather than the state."). The child, generally unable to care for his or herself, clearly has his or her own "complementary interest in preserving relationships that serve her welfare and protection." *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting). As Justice Stevens explained:

> While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel.

Id. at 88-89 (Stevens, J., dissenting) (citation omitted); *see also Santosky*, 455 U.S. at 760 ("[T]he child and his parents share a vital interest in preventing erroneous termination of their natural relationship.").

By affirming the child's reciprocal right, this Court would neither expand the list of substantive rights nor require states to recognize a new interest in the family relationship. Indeed, for nearly 90 years, this Court has

suggested in dicta that a child has reciprocal rights of his or her parents. *See, e.g., Pierce v. Soc'y of Sisters*, 268 U.S. 510, 510 (1925) (stating case involved "rights of the parents . . . to send their children to such schools, and the rights of the children themselves"); *Prince*, 321 U.S. at 165 (finding at stake "rights of children to exercise their religion, and of parents to give them religious training"); *Michael H.*, 491 U.S. at 131 (identifying child's liberty interest in maintaining filial relationship as "obverse" of father's). Many states already recognize that the child has a stake in decisions affecting the family relationship. *E.g.*, 705 Ill. Comp. Stat. 405/2-17 (2007) (Illinois statute requiring court to appoint guardian *ad litem* to represent child in every case of alleged abuse or neglect).

When the State infringes the parent's substantive right, it necessarily infringes the child's reciprocal right. *See J.B. v. Washington County*, 127 F.3d 919, 925 (10th Cir. 1997) ("forced separation of parent from child . . . represents a serious infringement upon both the parents' and child's rights") (internal quotations omitted). Because the child possesses the reciprocal right of his or her parent, the child's interests must also be considered in determining whether the State permissibly intruded into the family. *See Parham*, 442 U.S. at 631 ("Notions of parental authority and family autonomy cannot stand absolute and invariable barriers to the assertion of constitutional rights by children.") (Brennan, J., dissenting). The child's reciprocal substantive rights are equally important in determining whether State action is constitutional under substantive due process. A clear holding from this Court, recognizing

the child's reciprocal rights, would guide States in crafting their policies and practices designed to protect a child from an abusive or neglectful parent.

II. THE SUPREME COURT SHOULD REVIEW A PROCEDURE THAT SIGNIFICANTLY AFFECTS THE INTEGRITY OF THE FAMILY.

The safety plans implemented by DCFS drastically affect the parent-child relationship by ordering their separation, often for an indeterminate period of time, or otherwise placing significant restrictions on the relationship. Because safety plans can and do have lasting negative effects on the family, it is imperative that DCFS establish clearly-defined procedures that adequately represent all interests at stake in the process. DCFS has not done this. By failing to provide such procedures here, DCFS has failed to do what the Constitution requires—balance the State's interest in safety with the protections due families. The Supreme Court should grant certiorari in order to review this widely used procedure that impacts the most basic of family relationships.

A. The Forced Separation of Parent and Child Has Profound Immediate and Lasting Effects on the Family Relationship.

The separation of a parent and child, even temporarily, can have profound negative repercussions on all members of the family. "Certainly, even brief separation from parental care is an unfortunate and usually traumatic event for children." Comm. on Early Childhood, Adoption, and Dependent Care, Am. Acad.

of Pediatrics, *Health Care of Young Children in Foster Care*, 109 Pediatrics 536, 539 (2002); *see also* Testimony of Dr. Galatzer-Levy (N.D. Ill. No. 97 C 4199, Trial Tr. vol. 8, 1068, Sept. 12, 2002) ("Now, going forward the child has learned something very important and terrifying; that is, that the relationship with a parent can be suddenly and unpredictably interrupted so that the child is likely to be left with a fear of separation that may very well follow them throughout their lives."); N. Littner, *Some Traumatic Effects of Separation and Placement* 8 (1956) ("No matter what the realistic reason for the separation, the child seems to experience first . . . a feeling of abandonment, which contains elements of loss, rejection, humiliation, complete insignificance, and worthlessness.").

DCFS-implemented safety plans often require separating parent and child for varying periods of time, with predictably traumatic results. One mother in this case testified that while the safety plan was in place "[i]t was very hard for us to function through the day." (Trial Tr. vol. 4, 498, Sept. 6, 2002). Another mother testified that, even nine months after family reunification "[t]he kids are scared that their father will leave again." (*Id.* at vol. 6, 835.) A third mother testified that while the safety plan was in place, her son "didn't sleep. He would walk around looking for [his father] all night long." (*Id.* at 1324.)

Beyond the psychological effects, safety plans create a host of other practical problems that negatively impact families. For instance, DCFS's procedures provide no mechanism to ensure that a child's ongoing needs—beyond basic safety—will be met once a safety plan is

established. In many cases safety plans disrupt a child's medical care, schooling, and contact with extended family members. These other needs are often overlooked because they are not addressed in the Child Endangerment Risk Assessment Protocol ("CERAP") used by investigators to establish an appropriate safety plan, and investigators simply are not required to consider factors other than imminent safety. The CERAP's silence about a child's ongoing needs allows investigators to overlook those needs when crafting a safety plan, and can result in the denial of parents' requests to take such needs into account. In those cases in which parent representatives seek to raise concerns about such ongoing needs in connection with safety plans, DCFS often responds that investigators are not required to examine such issues because they are "only" conducting an abuse and neglect investigation.

The procedures also do not require that non-custodial parents be involved in the planning process, and consequently in many cases non-custodial parents are not informed of the safety plan or DCFS's involvement with their children. The protocol is silent on an investigator's duty to consult or even inform the non-custodial parent about the safety plan. But a non-custodial parent's involvement is more than a formality. A safety plan may place a child with a relative who lives farther away from a non-custodial parent or otherwise interferes with that parent's right to visitation. Without a coherent or consistent policy, investigators are not compelled to and do not involve non-custodial parents in the process. Because safety plans can have lasting

negative effects on the family, it is imperative that the State establish clearly defined procedures that adequately represent all interests at stake in the process.

B. The Seventh Circuit Failed to Consider the Negative Effects Safety Plans Have On the Family Relationship.

The Seventh Circuit trivialized the significant impact that DCFS's safety plans have on families by reducing family relationships to the type of monetary interests at issue in a tort lawsuit or suit for restitution. *Dupuy v. Samuels*, 465 F.3d 757, 761 (7th Cir. 2006). Such a commodified view of family relationships is anathema to this Court, which long ago declared it "plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Stanley*, 405 U.S. at 651 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)). The Seventh Circuit characterized the safety plans as "voluntary," dismissing any possible implication of fundamental rights. However, the safety plan process can—and does—exclude individuals with cognizable liberty interests and valid concerns, and safety plans are comprised of several components that directly impact a family's well-being. The Seventh Circuit's treatment of safety plan agreements is in direct conflict with the Third Circuit's analysis. *Cf. Croft*, 103 F.3d 1123. In light of this conflict, lower courts facing similar issues will likely be influenced by the Seventh Circuit's decision, despite the court's paltry analysis of the fundamental rights that

"voluntary" agreements implicate. The Supreme Court should grant review to reaffirm the centrality of the fundamental right to familial relationships in the analysis of a State procedure that necessarily and significantly disrupts family integrity.

III. THE SUPREME COURT SHOULD DECLARE DCFS'S PROCEDURES FOR ESTABLISHING SAFETY PLANS UNCONSTITUTIONAL BECAUSE THEY FAIL TO ADEQUATELY SAFEGUARD THE FUNDAMENTAL RIGHTS OF PARENTS AND CHILDREN.

The voluntary removal of alleged perpetrators from the home may in some situations be a preferable alternative to taking a child into State custody. *See* Robin Fretwell Wilson, *Removing Violent Parents From the Home: A Test Case for the Public Health Approach*, 12 Va. J. Soc. Pol'y & L. 638 (2005). But without guiding standards, separation agreements, like the safety plans used by DCFS, fail to account for the fundamental rights at stake, leaving thousands of families to the unchecked discretion of State investigators.[2] The protocol governing DCFS-imposed safety plans fails to ensure that investigators honor parents' rights, with the result that investigators deprive parents of their right to the care and custody of their children without giving the parents

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[2] Many states use so-called "voluntary agreements" at the early stages of child protection investigations. *See generally* Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change*, 65 Tenn. L. Rev. 835 (1998) (detailing controversy surrounding voluntary agreements and recommending specific legislative reforms).

a genuine choice in the separation decision and based on only a mere suspicion of abuse. Even worse, the safety plan protocol in no way accounts for a child's right to his or her parents' care.

DCFS also fails to provide any procedure that allows families to challenge the basis for imposing a safety plan or the terms of the plan. The Supreme Court should grant review in order to announce constitutional standards that would permit the use of voluntary removal agreements in appropriate situations while also ensuring that DCFS does not violate the rights of parents and children.

A. DCFS Procedures for Establishing Safety Plans Fail to Safeguard Family Rights.

DCFS developed the CERAP to guide investigators in determining whether to implement safety plans and crafting the terms of the safety plans. *Dupuy v. Samuels*, 462 F. Supp. 2d 859, 864 (N.D. Ill. 2005). Nevertheless, the CERAP fails to safeguard the fundamental rights of parents or children.

1. DCFS procedures fail to adequately safeguard parents' substantive rights to care for their children.

Voluntary alternatives to formal abuse and neglect proceedings such as safety plans have long raised due process concerns. Over thirty years ago, this Court acknowledged the debate over voluntary placements: "The extent to which supposedly 'voluntary' placements are in fact voluntary has been questioned. . . . For

example, it has been said that many 'voluntary' placements are in fact coerced by threat of neglect proceedings and are not in fact voluntary in the sense of the product of an informed consent." *Smith*, 431 U.S. at 834; *see also Croft*, 103 F.3d at 1125 n.1 (finding that threatening father with placing his child in foster care unless he left the home was "blatantly coercive"); *Gottlieb v. Orange County*, 84 F.3d 511, 515, 522 (2d Cir. 1996) (discussing parent's decision to move out of home rather than place child in temporary custody); *Myers v. Morris*, 810 F.2d 1437, 1443 (8th Cir. 1987) (noting that mother pressured and misled into signing authorization for voluntary placement of children in foster care); *Dietz v. Damas*, 932 F. Supp. 431, 437 (E.D.N.Y. 1996) (recounting mother's statement that she placed her son with grandparents "out of desperation" because investigators threatened to take child); Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 Harv. Educ. Rev. 599, 601 (1973) ("A substantial degree of state coercion may be involved in many so-called voluntary placements, making the distinction between voluntary and coercive placement illusory.") (cited in *Smith*, 431 U.S. at 834).

"Voluntary agreements" are controversial because an initial abuse or neglect investigation provides fertile ground for coercive tactics. With child maltreatment investigations steadily increasing,[3] states have a strong interest in pursuing the voluntary removal of possible abusers to avoid the added burden on the state foster

[3] Child maltreatment investigations nationally increased from 1,766,190 in 2001 to 1,915,641 in 2005. Nat'l Ctr. on Child Abuse & Neglect, U.S. Dep't of Health & Human Serv., Child Maltreatment 2005 at Table 2-4 (2005).

care system. The incentive is passed along to investigators who encounter little resistance from parents who face having their child placed in foster care. Moreover, most parents involved with the child welfare system are poor and uneducated, Sedlak & Broadhurst, *Third National Incidence Study of Child Abuse and Neglect: Executive Summary* (1996); Panel on Research on Child Abuse and Neglect, National Research Council, *Understanding Child Abuse and Neglect* 123 (1993), leading to unequal bargaining power with State investigators and greater opportunity for coercion. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972) ("great disparity in bargaining power" may vitiate consent).

The CERAP and form documents signed by parents do little to counteract the risk of coercive tactics. Investigators are not required to present families with the CERAP form that provides the basis for finding that a child is unsafe, depriving parents of any opportunity to identify errors or challenge conclusions. *Dupuy*, 462 F. Supp. 2d at 869. The safety plan agreement form neither explains the legal standards and procedures DCFS must follow in order to remove a child from the home, nor is the investigator required to inform the alleged perpetrator of the rights he will be waiving. *Dupuy*, 462 F. Supp. 2d at 869, 893. Even those aspects of CERAP that are intended to produce a truly voluntary agreement are ineffective in practice. For example, an investigator is expected to "discuss the family's ideas for a safety plan in an effort to work out mutually-agreeable terms." *Id.* at 867. Yet nearly every plaintiff in this case testified that in reality "the investigator simply presented a proposed plan for his/her signature

with little or no discussion of the plan terms or alternatives" and under the threat that their children would be removed if they refused to sign. *Id.* at 867-69.

Voluntary agreements are not only ripe for coercion, but by requiring only a "mere suspicion" of abuse or neglect before imposing a safety plan, families are left to the unchecked discretion of investigators. Under the current CERAP process, a safety plan is warranted if the investigator finds at least a "cause for concern" that one of 15 safety factors is present, but this term is not defined. *Id.* at 864-65. In actuality, the presence of certain safety factors is based on the allegations alone (sometimes the product of an anonymous hotline call), requiring no actual investigation or evidence. *Id.* n.1 (citing factors 10-14). Surrendering a family's short-term fate to an investigator's naked suspicions exposes a family to the possibility of arbitrary separation, and in light of the disparate duration of safety plans, the separation can be indefinite. *Id.* at 880-82 (noting that, although safety plans are intended to be short-term measures, safety plans in record lasted anywhere from seven days to 16 months).

DCFS's ostensible attempts to honor parents' rights through the CERAP are well-intentioned but seriously flawed. The CERAP fails to guard against the abuses that are unavoidable when a State actor has unfettered discretion to impose an impossible choice upon parents without any evidentiary requirement. The Court should grant review in order to establish clear constitutional standards that will guide child welfare agencies in developing policies that appropriately balance the state's interests and families' fundamental rights.

2. DCFS procedures completely disregard a child's right to be raised and nurtured by his parents.

While DCFS makes a failing attempt to honor *parents'* rights through the CERAP, it makes no attempt to protect a *child's* right to be raised and nurtured by his parents. The Supreme Court should use this opportunity to formally recognize a child's right to his parents' care, and establish standards that ensure that this right is honored when a voluntary separation agreement is put in place.

While this Court has strongly implied that a child has a right to his parents' companionship, *see Santosky*, 455 U.S. at 760, lower courts have expressly recognized that a parent's fundamental right to care for his or her child carries with it a child's reciprocal right to be raised and nurtured by his or her parent. *Brokaw*, 235 F.3d at 1018; *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000) ("a child's right to family integrity is concomitant to that of a parent"); *J.B.*, 127 F.3d at 925 (recognizing that the forced separation even for a short time infringes the rights of parent and child). As the District Court in this case noted, when parents are separated from their children, "it is the children who lose the benefit of a stable environment." *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1130 (N.D. Ill. 2001).

When establishing safety plans, DCFS investigators are advised to interview alleged child victims but are not otherwise required to involve the child in the decision to implement a safety plan. If safety plans are voluntary agreements, they are voluntary only as to the parent.

The Court should declare unconstitutional a procedure that drastically affects a child's right to his parents' companionship, yet fails to safeguard consideration of the child's needs, circumstances and voice in the decision-making process.

B. DCFS Must Establish a Procedure to Challenge the Validity of Safety Plans and Alter Their Terms as Circumstances Change.

When DCFS has sufficient evidence indicating a safety risk to a child, a safety plan can be implemented to reduce the immediate risk of harm. However, it is inevitable that in some instances investigators violate constitutional rights when establishing safety plans that so significantly impact families. DCFS must afford families a meaningful post-deprivation process to contest the safety plan. Devising such a system would not be unduly burdensome for DCFS.

DCFS's own existing administrative procedures provide one possible model for such a post-deprivation process. For example, if a foster parent disputes a decision to remove a foster child from her home, she may request a Clinical Placement Review within three working days of notice of the removal. *See* 89 Ill. Admin. Code 337.30(c); DCFS Procedures 301.65. DCFS clinical staff must convene a Clinical Placement Review within five working days of a request. The purpose of the Clinical Placement Review is to review the child's placement, the reason for the disruption of placement, the child's needs, and the appropriateness and stability of the proposed placement. Because the separation of a parent and child can have devastating effects on a child,

there must be a similar mechanism to ensure that the State's plan to keep a child "safe" does not result in unnecessary harm to the child. A post-deprivation safety plan process before a neutral reviewer would improve outcomes for families.

In many situations, the absence of a post-deprivation review of the safety plan creates serious risks for children and families. In some situations, a parent who has been the primary caretaker of a child with complex medical needs may want the safety plan to allow for the continued care by that parent. The absence of a review means that these concerns may not be considered. Sometimes, the safety plan will expose a child to new risks. For example, there is no process to review parental requests that the agency modify a safety plan to limit contact by a relative with a violent history, even when the parent has some proof of the concern, such as a prior court order or evidence of domestic violence. If the investigator ignores the request, the parent cannot bring her concerns for an independent review of the risks to the child. In other cases, parents complete the services required by the safety plan, such as counseling, and ask DCFS to terminate the safety plan. When the investigator tells the parents that the plan will not end, parents have no mechanism to seek review of that decision. The child continues to suffer from the separation trauma and abandonment anxiety described above, without a meaningful review of whether compliance obviates the need for a continued plan.

Significantly, the Seventh Circuit's claim that parents can simply reject a safety plan does not remedy these situations. A parent's alternative to a safety plan

is a judicial proceeding to determine whether there is an "urgent and immediate necessity" to remove the child from that parent, not a hearing about whether the proposed safety plan is the right alternative. *See* 705 Ill. Comp. Stat. 405/2-10 (2007). There is no mechanism for parents to raise valid concerns for their child's well-being if the safety plan continues longer than anticipated or creates new risks. A post-deprivation safety plan process would accomplish the dual purpose of reviewing the need for the safety plan and reviewing the terms of the safety plan in order to minimize the trauma to the family.

CONCLUSION

For the reasons set forth above and in Petitioners' brief, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

American Coalition for Fathers and Children ("ACFC") is a Washington, DC non-profit organization with nationwide state organized affiliates advocating for children and parents involved in familial disputes. ACFC reviews state and federal legislation (existing and pending) impacting familial relationships as well as judicial decisions and interpretation of law impacting family association. In addition, ACFC advances education and conflict resolution protocols that promote communication and cooperation between parents with the knowledge that all fit parents have the right to equally participate in the rearing of their children. This particular case is of interest to ACFC because it involves the fundamental right to the parent-child relationship and due process of law as it applies to that right.

Children's Law Center of Minnesota ("CLC"), the only legal center for children in Minnesota, is a nonprofit organization whose mission is to advance the rights and interests of children in the judicial, child welfare, health care, and education systems. CLC represents children in the child welfare system and advocates for systemic reforms. CLC joins this brief because of the critical public policy issue at stake for the children it serves.

The Civitas ChildLaw Center is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its ChildLaw Clinic, the Center routinely provides representation to child clients in child

protection and other related types of cases. The Child Law Center maintains a particular interest in matters affecting the regulation of relationships between children, their parents and other adults.

Fathers4Justice, a national non-profit organization, helps fathers maintain relationships with their children and raises public awareness about the discriminatory impact child protection laws, regulations and policies have on fathers. Fathers4Justice's interest in this case is to ensure that a father's fundamental rights are protected against unnecessary disruption of his relationship with his child.

Juvenile Law Center ("JLC") is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies—for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide.

The Legal Assistance Foundation of Metropolitan Chicago ("LAF") is the largest provider of free civil legal services to low income individuals and families in Cook County, Illinois. LAF's Children's Law Project

represents parents, relative caregivers, foster parents and children involved in cases with DCFS in Juvenile Court and related administrative proceedings. LAF's clients have been adversely impacted by the DCFS policies and procedures in conducting abuse and neglect investigations and imposing safety plans. LAF, therefore, has a strong interest in protecting the rights of these individuals, including their right to a substantive review of the implementation and outcome of safety plans.

The Support Center for Child Advocates, a non-profit organization, provides free legal assistance and social service advocacy to abused and neglected children in Philadelphia, Pennsylvania. The organization also represents children in civil protective proceedings and in criminal prosecutions of their abusers.

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No. 07-1075

IN THE

Supreme Court of the United States

BELINDA DUPUY, *et al.*,

Petitioners,

v.

ERWIN MCEWEN, DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CATO INSTITUTE, THE INSTITUTE FOR JUSTICE, AND THE GOLDWATER INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

When a State has only "mere suspicion" of child abuse or neglect, does it deprive the parents and their children of their rights under the Due Process Clause of the Fourteenth Amendment when it:

(a) secures safety plans either by direction or by telling a parent that if they refuse to agree to a plan, the State may take custody of the children and place them in foster care; and

(b) provides no opportunity to contest the plans?

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute, the Institute for Justice, and the Goldwater Institute, as *amici curiae*, respectfully request that this Court grant the petition for writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files *amicus* briefs with the courts. The instant case is of central concern to Cato because it raises vital questions about individual rights and the rule of law.

The Institute for Justice is a nonprofit, public interest legal center established in 1991 and committed to defending the essential foundations of a free society and securing greater protection for individual liberty. The Institute has a particular interest in protecting the natural right of parents to

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have been given timely notice of the filing of this brief, and letters of consent have been filed with the Clerk.

direct the upbringing and education of their children. Among the issues the Institute has litigated in this area are parental school choice and mandatory community service as a condition of public high school graduation. The Institute also filed an amicus brief supporting parental rights in *Troxel* v. *Granville*, 530 U.S. 57 (2000).

The Goldwater Institute, established in 1988, is a nonprofit, independent, nonpartisan, research and educational organization dedicated to the study of public policy. Through its research papers, editorials, policy briefings and forums, the Institute advances public policies founded upon the principles of limited government, economic freedom and individual responsibility. A core purpose of the Goldwater Institute and its Center for Constitutional Litigation is the preservation of constitutional liberties, including family relationships.

STATEMENT OF THE CASE

Amici adopt the factual and procedural background set forth in the Petition.

This case presents fundamental questions regarding the State's ability to interfere with familial relations through a coercive means of inducing family members to abandon their homes and families. The court below erred in holding that the Petitioners "consented" to the waiver of their protected family rights. *Amici* contend that the Petitioners could not validly "consent" to the State of Illinois's ("State") offer of a non-statutory "Safety Plan" because the demand itself was unlawful under the unconstitutional conditions doctrine.

Under the Due Process Clause of the Fourteenth Amendment, governments may not infringe on

fundamental rights such as the right to family integrity without satisfying the requirements of due process. Under the unconstitutional conditions doctrine, the government cannot demand that citizens waive fundamental rights in circumstances where the government cannot lawfully command the same result directly. For instance, this Court has held that the government may not condition the receipt of benefits on "consent" to speech regulations when it cannot regulate the speech directly. *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). This doctrine enunciates a powerful and fundamental principle that the government may not pursue even potentially laudable goals through means that violate the Constitution.

Here, the State seeks to do indirectly what it has no authority to do directly. The State seeks to circumvent due process by coercing parents to "consent" to non-statutory "Safety Plans" that infringe on family rights by threatening that the parents' children may be removed and put into foster care. Whereas the State's child removal statute, which is not directly at issue here, requires officials to have "reason to believe" that a child is in imminent danger in order to remove that child from abusive parents with judicial approval, 325 Ill. Comp. Stat. 5/5; Pet. App. 15, the informal rules implementing the alternative "Safety Plan" procedure do not enunciate any minimum standard that officials must satisfy before demanding that parents "consent" to restrictions on their parental rights. Pet. App. 14-15. As the "Safety Plans" apply even in circumstances where the State cannot lawfully interfere with family integrity directly, the State violates the Constitution by coercing parents to waive their core familial rights to avoid threatened conduct that violates the Due

Process Clause. These "Safety Plans" also violate due process by placing unfettered discretion in the hands of state officials to interfere with core familial rights.

REASONS FOR GRANTING THE PETITION

I. FAMILY INTEGRITY IS A FUNDAMENTAL RIGHT THAT THE STATE MAY NOT ABRIDGE THROUGH ITS SAFETY PLAN PROCESS.

The Due Process Clause of the Fourteenth Amendment protects fundamental liberties such as family integrity. Here, the State's "Safety Plans" violate due process because they (i) result in the deprivation of familial rights without requiring the government to satisfy any minimum threshold to justify the removal of children from potentially abusive households, and (ii) do not provide procedural protections to ensure that parents' rights are not trammeled unlawfully and that state officials operate within the law. The "Safety Plans" also impermissibly vest state officials with unfettered and unreviewable discretion to infringe on parents' fundamental family rights.

A. Family Integrity Is A Fundamental Right.

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." As this Court has explained, the Due Process Clause protects the fundamental liberties of private citizens from undue interference by the government. "[T]he Due Process Clause, like its forebear in the Magna Carta, was "'intended to secure the individual from the arbitrary exercise of the powers of government.'" *Daniels* v. *Williams*, 474

U.S. 327, 331 (1986) (internal citations omitted). Due process "requir[es] the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property.'" *Id.*

The family lies at the heart of civilization, and protecting its privacy and integrity from undue state interference is essential to the maintenance of a free society. Although "the Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Michael H.* v. *Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion) (citing *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)), this Court has "'long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'" *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 499 (1977) (quoting *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639-40 (1974)). *Accord Loving* v. *Virginia*, 388 U.S. 1, 7 (1967), and *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). In *Moore*, this Court explained:

> the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

431 U.S. at 503-04 (footnote omitted). See also *Michael H.*, 491 U.S. at 123 (noting the "historic respect – indeed, sanctity . . . traditionally accorded to the relationships that develop within the unitary family.").

Thus, in *Meyer* v. *Nebraska*, this Court determined that *liberty* "denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U.S. 390, 399 (1923). *Accord Wisconsin* v. *Yoder*, 406 U.S. 205, 233 (1972). As a plurality of this Court has more recently explained, the "liberty interest at issue . . . – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65 (O'Connor, J.). Similarly, in *Meyer*, this Court explained that "this [family] liberty may not be interfered with, under the guise of protecting the public interest" and held that parents have a fundamental right to control the education of their children. 262 U.S. at 399-400. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . . [for which reason this Court has] respected the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (internal citation omitted). Therefore "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66 (plurality opinion).

B. Family Integrity May Not Be Abridged Without Due Process.

Due process requires that the State provide adequate procedures and safeguards against the erroneous or arbitrary infringement of protected liberties. Although the right of family and

childrearing is fundamental, this Court has recognized that "the rights of parenthood," like other rights, are not "beyond limitation." *Prince*, 321 U.S. at 166. See *Stanley* v. *Illinois*, 405 U.S. 645, 649 (1972) (recognizing the "State's right – indeed, duty – to protect minor children through a judicial determination of their interests in a neglect proceeding.") The State's ability to interfere with family integrity is likewise constrained by the Constitution:

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Troxel, 530 U.S. at 68-69 (plurality opinion).

In short, the government may not abridge family integrity without first meeting the high threshold imposed by the Constitution. "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore*, 431 U.S. at 499. In *Stanley*, this Court cautioned that the interest of "a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." 405 U.S. at 651. Where the "issue at stake is the dismemberment of [a] family," the convenience to a government of a presumption against parental fitness of unwed fathers is "insufficient to justify refusing a father a hearing" prior to deprivation of custody. *Id.* at 658. Thus:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . . Even where blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.

Santosky v. *Kramer*, 455 U.S. 745, 753 (1982).

Further, to justify interfering with families, the State must provide procedural mechanisms that satisfy the requirements of due process. *Id.* The "nature of the process due in parental rights termination proceedings turns on a balancing of the 'three distinct factors' specified in *Mathews* v. *Eldridge*." *Id.* at 754. In *Mathews*, this Court explained that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." 424 U.S. 319, 332 (1976). It is fundamental to procedural due process that individuals who are "'condemned to suffer grievous loss of any kind'" must be afforded "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333.

Procedural due process is "flexible," *id.* at 334, but it involves three essential factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; [and third,] the Government's interest, including the function involved and the fiscal and administrative burdens that the

> additional or substitute procedural requirement would entail.

Id. at 335.

This Court has recognzied that family integrity requires especially strong protection against government interference. For example, in *Santosky*, this Court struck down New York's "preponderance of the evidence" standard in parental rights termination proceedings because of the substantial risk of error. As the Court explained, "'[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss."'" *Santosky*, 455 U.S. at 758 (quoting *Goldberg* v. *Kelly*, 397 U.S. 254, 262-63 (1970)). This Court noted "that a natural parent's 'desire for and right to the "companionship, care, custody, and management of his or her children"' is "'plain beyond the need for multiple citation,'" and thus parents have a "commanding" interest in the accuracy of a decision and require the application of an elevated standard of proof. *Id.* at 758.

C. The "Safety Plans" Do Not Satisfy Due Process.

The proceess provided by the Illinois Department of Child and Family Services ("DCFS") is constitutionally inadequate under these cases. As discussed above, the State cannot permanently separate parents and children absent compliance with due process. It follows that the State cannot justify the removal of children from their homes on a more than *de minimis* basis without affording private citizens at least some fair process. Here, the court below acknowledged that the curtailment of parental liberty caused by the "Safety Plans" implicated due

process concerns. Pet. App. 13. Application of the *Mathews* v. *Eldridge* factors demonstrates that the non-statutory "Safety Plan" procedures are constitutionally inadequate in these circumstances.

First, the parents' protected interest here is commanding. Although petitioners do not face the prospect, at this point, that the State will permanently terminate their parental rights, they do face a significant interruption of their right to the "companionship, care, custody, and management" of their children, which this Court has repeatedly recognized as a fundamental right. Pet. App. 14. See, *e.g.*, *Troxel*, 530 U.S. at 67-68 (plurality opinion) (non-custodial visitation over parental objection infringes upon the parental right to make decisions concerning child-rearing.).

Second, the "Safety Plan" procedure creates a grave risk that parents will suffer an erroneous deprivation. Ordinarily, Illinois permits State agents to remove "at risk" children forcibly once the State has satisfied a minimum threshold of proof, and the removal of a child subjects the State's action to judicial scrutiny within a short period of time. Specifically, under its child-removal statute, Illinois may forcibly remove a child from its home, absent prior judicial authorization, only if (1) it has "reason to believe that the child cannot be cared for at home or in the custody of the person responsible for the child's welfare without endangering the child's health or safety; and (2) there is not time to apply for a court order . . . for temporary custody of the child." 325 Ill. Comp. Stat. 5/5. After removing a child without prior judicial authorization, the statute requires the State to "promptly initiate proceedings . . . for the continued temporary custody of the child." *Id.*

By contrast, the non-statutory "Safety Plan" procedure at issue in this case offers no check on the State's authority to infringe on family integrity. Under this procedure, Illinois DCFS may offer parents the possibility of a "Safety Plan" when officials have "mere suspicion" of child abuse (notably, a lower standard than is applied for the removal of children).[2] In such situations, the State demands that parents choose between (1) consenting to a "Safety Plan" under which the State will impose restrictions short of permanent removal of children from home pending completion of an investigation, which is not time-delimited, or (2) rejecting the "Safety Plan" and risking that the State will make good on its threats to forcibly remove the children to foster care.

Once subjected to unsubstantiated accusations of neglect or abuse, parents under the Illinois system are presented with a Hobson's choice that leaves no possibility of preserving their constitutionally-protected autonomy over their children. To make matters worse, the State's agents are not required to justify the basis for the "Safety Plan" when requiring parents to make a choice, ensuring that parents cannot meaningfully evaluate whether DCFS can satisfy the legal requirement to remove children. Moreover, as the district court below concluded, the State has "no procedure authorizing those subject to a safety plan to contest it in any way." Pet. App. 50.

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[2] As the district court below explained, the "plans" vary in their scope, and they may require one parent to leave the house where the child is living, preventing a parent from being in the presence of the child unless he or she is supervised by designated parent or other "safety person" to be in the presence of the child at all times, or even sending the child to live with relatives. Pet. App. 54-73.

Thus, the State need not articulate *any* justification to parents or to the judiciary in order to infringe on family integrity through the "Safety Plan" process. Consequently, these "Safety Plans" fail the second factor of the *Mathews* test because they create an enormous risk that the State will erroneously deprive citizens of their fundamental rights after parents, coerced by the State, "waive" those rights under the threat of an even greater deprivation.

Third, in the absence of some articulable and reasonable evidence of malfeasance, the State's undoubted interest in protecting children from abuse or neglect cannot outweigh the parents' fundamental right to family integrity. See *Meyer*, 262 U.S. at 399-400. Indeed, as noted above, the State already has an alternative procedure in place to remove children from abusive homes on an emergency basis, and this process requires the articulation of evidence and subsequent judicial scrutiny. 325 Ill. Comp. Stat. 5/5. Therefore, there is no reasonable practical, legal, or administrative hurdle preventing the State from affording appropriate due process to parents.

In sum, the court below allowed the State to intrude on a fundamental right protected by the Due Process Clause without affording adequate – or any – procedural protections. Instead, due process requires the State (i) to articulate objectively reasonable evidence of abuse or neglect to justify having threatened parents with removal, and (ii) to satisfy some periodic judicial scrutiny to guard against abuse of the Safety Plan program.

D. The "Safety Plans" Violate Due Process By Vesting Unfettered Discretion In State Officials.

The "Safety Plans" also violate due process by vesting unfettered and unreviewable discretion in the hands of state officials to interfere with fundamental familial rights. Through its "Safety Plans," the State empowers its officials to impose restrictions on parents' fundamental rights without (1) any apparent check to govern the agent's authority to impose the mechanism in the first instance, or (2) any procedure by which the agent's decisions could be subjected to judicial scrutiny after the fact.

The Constitution provides a bulwark against arbitrary and unlawful government action. See *Bank of Columbia* v. *Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819) (an individual should be secure from "the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice"); *Dent* v. *West Virginia*, 129 U.S. 114, 124 (1889) ("The great purpose of the [due process] requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."). Due process imposes limits on the discretion of government officials to act, especially where fundamental rights are at stake.

These limitations proceed on the assumption that (i) an official who is accountable will act more prudently, and (ii) a parent who has an appeal to a body independent of the controversy has protection against a government official's passion, obstinacy, irrational conduct, or incompetence. These principles are widely applicable, and judicial review of governmental action therefore is necessary in circumstances ranging from denial of government

benefits to restraints on constitutionally-protected speech. See *Goldberg* v. *Kelly*, 397 U.S. 254, 266-69 (1970) (holding that when public assistance payments are to be discontinued, due process requires a pretermination evidentiary hearing). Thus, "'unbridled discretion in the hands of a government official or agency'" is an "evil[] that will not be tolerated." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 225 (1990) (O'Connor, J.). An ordinance that "'makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.'" *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 151 (1969) (citation omitted). Consequently, an official's "uncontrolled discretion" over "freedoms which the Constitution guarantees" is unacceptable. *Staub* v. *City of Baxley*, 355 U.S. 313, 322 (1958).

An analogous burden exists here because the State has vested unfettered discretion in its officials to intrude on fundamental rights through the non-statutory "Safety Plan" procedure. On a "'mere suspicion'" of abuse or neglect, Pet. App. 14-15 – which can be based on nothing more than an anonymous tip – State officials are empowered to determine whether a family shows signs of any of fifteen "safety factors" (including an undefined "other" factor). *Id.* at 35-36 & n.1. State officials are not required to meet any specific threshold of evidence for any of the factors, *Id.* at 37, and there are no apparent objective criteria governing the assessments. *Id.* at 39-40. Further, it is unclear whether there are any limits on the plans' duration, *id.* at 47-48, and, as noted above, no judicial recourse has been afforded to parents. *Id.* at 49-50. The

"Safety Plan" regime thus is onerous and menacing. Indeed, it is so intimidating that, out of the tens of thousands of people who have been affected by the plans, virtually every parent has "consented." *Id.* at 44.

Consequently, the non-statutory "Safety Plan" program violates due process and the rule of law by placing absolute, unfettered, and unreviewable power in the hands of State officials to infringe on fundamental rights. Such unchecked power violates fundamental tenets of due process, and cannot coexist with a system of limited government and the rule of law.

II. THE STATE'S "SAFETY PLANS" IMPOSE AN UNCONSTITUTIONAL CONDITION THAT IMPROPERLY INFRINGES ON FAMILY INTEGRITY.

Contrary to the ruling below, the State's "Safety Plans" cannot be upheld on the theory that parents have consented to the deprivation of their fundamental familial rights. The unlawful character of the Safety Plans invalidates any "consent" that the State may have obtained. Because the government may not directly interfere with fundamental rights without first satisfying due process, it may not obtain that result indirectly by threatening parents with an unconstitutional deprivation of their rights unless they agree to abide by a "Safety Plan." Through its "Safety Plans," the State seeks to impose a condition on private citizens that abridges family integrity even though the State may have no lawful authority to do so directly. Consequently, consent obtained by the State does not insulate the "Safety Plan" system from review under the Due Process Clause.

A. The Unconstitutional Conditions Doctrine Prohibits The Government From Accomplishing Indirectly What It May Not Lawfully Command Directly.

This Court has explained that states "may not seek to achieve an unlawful end either directly or indirectly." *Elrod* v. *Burns*, 427 U.S. 347, 359 n.13 (1976); *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958) (the State may not "produce a result which the State could not command directly"). Applying that principle, this Court has held that the Constitution forbids the government from inducing private citizens to waive or abate protected rights in circumstances where the government could not lawfully do so directly. See, *e.g.*, *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (state committed a taking where agency conditioned building permit on grant of public easement); *Elrod*, 427 U.S. at 359-60 (public employment may not be conditioned on support for political party); *Sindermann*, 408 U.S. at 597 (government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests").

The unconstitutional conditions doctrine restricts the government from bargaining with its citizens so as to ensure that sovereign power is not abused improperly to coerce private individuals into waiving fundamental liberties. *United States* v. *Oliveras*, 905 F.2d 623, 627 n.7 (2d Cir. 1990) (per curiam) ("[t]he key proposition of the unconstitutional condition doctrine is that the government may not do indirectly what it cannot do directly."); see also Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 15-25 (1988).

This doctrine has been applied to protect a wide variety of property and other rights. For instance, in a long series of First Amendment decisions, this Court has recognized that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972). The government thus violates the First Amendment when it conditions the receipt of benefits on an individual's agreement to a restriction on his or her speech, belief, religious, or association rights. See, *e.g.*, *Bd. of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 674-75 (1996) (termination of government contractors); *Elrod*, 427 U.S. at 359-60 (conditioning public employment on supporting political party); *Sindermann*, 408 U.S. at 597-98 (denial of tenure); *United Pub. Workers of Am. (CIO)* v. *Mitchell*, 330 U.S. 75, 100 (1947) (denial of public employment).[3]

Moreover, in *Nollan*, this Court held that a state agency violated the Takings Clause when it conditioned the award of a building permit on the property owner's grant of an easement to the government. *Nollan*, 483 U.S. at 831. Because an uncompensated taking would have occurred had the government directly required the property owner to grant the easement, the government could not secure that same result indirectly. *Id.* These principles are likewise applicable to other rights protected by the Constitution. For example, public employees do not waive their Fourth Amendment rights merely by

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[3] *See also Speiser*, 357 U.S. at 526 (denial of tax exemptions); *Sherbert* v. *Verner*, 374 U.S. 398, 404-05 (1963) (unemployment benefits); *Shapiro* v. *Thompson*, 394 U.S. 618, 627 n.6 (1969) (welfare payments), *overruled on other grounds by Edelman* v. *Jordan*, 415 U.S. 651 (1974).

accepting a government job. *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 665, 672 n.2 (1989) (citing *O'Connor* v. *Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion)).[4]

Further, the lower courts have recognized that the right against self-incrimination may be violated when an "acceptance of responsibility" sentencing reduction is conditioned on admitting conduct beyond the specific conduct of the offense for which a person was convicted. *Oliveras*, 905 F.2d at 628 ("[t]o require a defendant to accept responsibility for crimes other than those to which he has pled guilty or of which he has been found guilty in effect forces defendants to choose between incriminating themselves as to conduct for which they have not been immunized or forfeiting substantial reductions in their sentences to which they would otherwise be entitled to consideration."). See *United States* v. *Saunders*, 973

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[4] Similarly, the Ninth Circuit has held that a criminal suspect who was released on his own recognizance before trial did not validly consent to random drug testing, even though it was an express condition of his pre-trial release. *United States* v. *Scott*, 450 F.3d 863, 866-68 (9th Cir. 2006). The Eleventh Circuit has found that a city may not compel individuals to submit to searches in order to participate in protests, despite the city's claim that the searches were "voluntary" because the protesters were required to submit to searches only if they chose to participate in the protest. *Bourgeois* v. *Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004). *See also O'Connor* v. *Pierson*, 426 F.3d 187, 201 (2d Cir. 2005) (school board may have violated teacher's privacy interests when demanding release of those records as a condition to returning to work); *R.S.W.W.* v. *City of Keego Harbor*, 397 F.3d 427, 434-36 (6th Cir. 2005) (city violated due process when conditioning liquor license on restrictions which city had no authority to demand, noting that the Unconstitutional Conditions doctrine "should equally apply to prohibit the government from conditioning benefits on a citizen's agreement to surrender due process rights").

F.2d 1354, 1363 n.1 (7th Cir. 1992) (noting conflict among circuits).

Thus, a government may demand the waiver of important rights in exchange for the receipt of benefits only if it could abridge those rights directly. For instance, in *Rumsfeld* v. *Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47 (2006), this Court affirmed the constitutionality of the Solomon Amendment only after determining that Congress could directly require campus access for military recruiters under the Constitution. *Id.* at 57-58. In *United States* v. *Knights*, 534 U.S. 112, 118 n.4 (2001), this Court held that conditioning parole on assent to future searches did not violate Due Process, and thus did not reflect an unconstitutional condition, even though the government admitted that the unconstitutional conditions doctrine set "a limitation on what a probationer may validly consent to in a probation order." *Id.* at 118 n.4.

B. The "Safety Plans" Violate The Unconstitutional Conditions Doctrine.

These principles apply equally to an individual's fundamental right of family integrity. As such, the State may not bargain with individuals to give up their rights to avoid the imposition of an unconstitutional deprivation.

To allow the State to infringe on family integrity through the imposition of "Safety Plans" in circumstances where the State could not lawfully interfere directly undermines the due process protections applicable to family rights. If a government could circumvent constitutional limitations simply by indirectly coercing private citizens into "waiving" their rights, then the fundamental rights protected by the Constitution would be no stronger

than the will of a private citizen to defy the state's threats with regard to the fate of his or her children. Indeed, under the ruling below, the story of King Solomon would need to be rewritten so that the mother who agreed to give up her infant to avoid the awful consequence offered by King Solomon should be held to her "choice" because she consented and thus was no worse off from being offered that "choice." Pet. App. 16. The uncon-stitutional conditions doctrine, however, protects private citizens from facing this Hobson's choice by establishing limits on the state's ability to coerce its citizens.

According to the court below, this case involves a simple negotiation between the government and private citizens: through its "Safety Plan" procedure, the State offers not to remove children from their parents immediately or permanently in exchange for the parents' consent to the State's intrusion into their family integrity. Pet. App. 14. But the Safety Plans do not require the State to justify the statutory or due process standards for removing children from abusive homes. Nor do the Safety Plans provide any procedural due process protections (or any judicial scrutiny at all) after the deprivation has occurred. *Id.* at 50.

If the State may not directly infringe on a protected right, it may not accomplish the same result indirectly simply by threatening to remove those liberties. The State of Illinois may not constitution-ally impose limitations on family integrity absent due process. It thus may not impose "Safety Plans" that seek the waiver of those rights unless, at a minimum, it satisfies due process by (1) obtaining sufficient good cause to warrant the invasion of a fundamental right, and (2) providing a procedural avenue for verifying and challenging the plans. Yet the "Safety Plans"

neither require the State to ascertain sufficient evidence to intrude on family integrity prior to making demands of parents, nor provide for any procedural protections whatsoever.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 07-1075

IN THE

Supreme Court of the United States

BELINDA DUPUY, *et al.*,

Petitioners,

v.

ERWIN MCEWEN, DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE THE CHICAGO COALITION FOR THE HOMELESS; CHICAGO LEGAL ADVOCACY FOR INCARCERATED MOTHERS; COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.; EQUIP FOR EQUALITY; THE SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, HEALTH & DISABILITY ADVOCATES; THE BATTERED WOMEN'S RESOURCE CENTER; AND THE NEW YORK LEGAL ASSISTANCE GROUP IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are non-profit organizations serving low income families, families with members who have disabilities, and families with members who are suffering other disadvantages such as domestic abuse. Amici include the Chicago Coalition for the Homeless, the Chicago Legal Advocacy for Incarcerated Mothers ("CLAIM"), Council of Parent Attorneys and Advocates, Inc. ("COPAA"), Equip for Equality, the Sargent Shriver National Center on Poverty Law, Health & Disability Advocates, and the Battered Women's Resource Center, and the New York Legal Assistance Group.

SUMMARY OF ARGUMENT

The Seventh Circuit has established a new and incorrect standard for evaluating voluntariness in *Dupuy v. Samuels*, 465 F.3d 757 (7th Cir. 2006). The Seventh Circuit held an agreement to relinquish parental rights is only involuntary if the State makes a misrepresentation to induce the agreement. *Id.* at 763. This misrepresentation standard ignores and contradicts substantial Supreme Court precedent holding voluntariness must be evaluated using a totality of circumstances test. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). It also directly conflicts with a decision by the Third Circuit, which held on essentially

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and each has been given at least 10 days notice of amici's intention to file.

the same facts, that a threat to remove a child if the parent did not agree to leave the house was coercive and not voluntary, without regard to whether there was a misrepresentation. *See Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123 (3d Cir. 1997). The Seventh Circuit's standard leads to illogical results: the threat to take a child out of the home immediately is coercive if false, but is not coercive if true, even though the coercive effect of both statements is identical. Because the Seventh Circuit holds parents' due process rights are not implicated by an agreement to leave their house voluntarily, its unduly narrow and incorrect interpretation of voluntariness results in parents being forced to leave their homes based on mere suspicion of abuse, as in this case, or without any evidence of abuse whatsoever.

The damage done by the violation of a due process right affects all segments of society. Unnecessary safety plans which abruptly break apart families, harm people from all walks of life. Poor and disadvantaged families, however, carry a greater burden in trying to remedy this damage. These families lack resources at the initiation of the safety plan (access to counsel for advice), during the safety plan (access to alternative living arrangements and transportation), and after the safety plans (access to psychological, social work, or other professionals to help the child ameliorate the effects of the trauma). Amici raise concerns with this Court about poor, disabled, and otherwise disadvantaged families because these are the families Amici serve. Amici have insight into unintended consequences of this state practice, which illustrates why this case is of such importance that this Court must

accept it for review to correct the Seventh Circuit's improper narrowing of the voluntariness standard.

I. THE SEVENTH CIRCUIT ABANDONS 40 YEARS OF SUPREME COURT PRECEDENT, REDUCING THE STANDARD FOR VOLUNTARINESS TO NOTHING MORE THAN THE ABSENCE OF A MISREPRESENTATION.

In *Dupuy*, the Seventh Circuit held the State's threat to immediately remove a child is not coercive and does not render a parent's consent to a safety plan relinquishing parental rights involuntary, unless the State's threat is false. 465 F.3d at 763. The Seventh Circuit's focus on a single criterion—that is, coercion only exists where there is a misrepresentation—is unprecedented. Indeed, this Court has repeatedly held that voluntary consent and coercion are established by examining the totality of circumstances.

A. The Seventh Circuit's holding directly contradicts the totality of circumstances test established by the Supreme Court.

The totality of circumstances test was carefully crafted by the Supreme Court in *Brady v. United States*, 397 U.S. 742, 749 (1970) (voluntariness to an agreement "can be determined only by considering all of the relevant circumstances surrounding it"), and has been cautiously protected by this Court ever since. *See Schneckloth*, 412 U.S. 218; *see also United States v. Drayton*, 536 U.S. 194, 207 (2002); *Withrow v. Williams*, 507 U.S. 680, 689 (1993); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *Haynes v. Washington*, 373 U.S. 503, 520–21 (1963). To

determine if consent to a governmental action was voluntary or coerced, a court must "assess[] the totality of all the surrounding circumstances." *Schneckloth*, 412 U.S. at 226. Voluntary consent is not determined by "the presence or absence of a single controlling criterion." *Id.* The rationale behind the totality of circumstances test is that the law will not condone using a person's apparent consent against him when his will has been over-borne and his consent is the product of coercion. *Id.*

The totality of circumstances test requires courts to carefully "scrutin[ize] all the surrounding circumstances." *Id.* Courts have considered, among other things, an individual's age, lack of education, intelligence, and access to counsel. *See, e.g., Payne v. Arkansas*, 356 U.S. 560 (1958); *Fikes v. Alabama*, 352 U.S. 191 (1957); *Davis v. North Carolina*, 384 U.S. 737 (1966). Courts have also considered government coercion or threats. *Bumper v. North Carolina*, 391 U.S. 543, 548–50 (1968).

Under the totality of circumstances, the fact that the government threatens an individual may inform the court's decision about whether consent is voluntary, but it is not controlling. This is true regardless of whether the government has a legal right to make the threat or whether the threat is a misrepresentation. Indeed, this Court has affirmed the finding of voluntary consent in cases where the government's threat was an indisputable misrepresentation and has found consent to be involuntary in cases where the government's threat was true. *See, e.g., Frazier v. Cupp*, 394 U.S. 731, 737-39 (1969) (voluntariness affirmed *despite* indisputable misrepresentations made by police); *Bumper*, 391 U.S.

at 548–50 ("[w]hen a law enforcement officer claims authority to search a home under a warrant ... [t]he situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.").

The totality of circumstances test was initially developed in criminal cases involving Fourth and Fourteenth Amendment rights, but it has since been applied in the civil arena. *See, e.g., Regenold v. The Baby Fold, Inc.*, 369 N.E.2d 858, 866 (1977) (totality of circumstances test used to consent to adoption); *see also Cherita v. Gresbach*, 479 F. Supp. 2d 914, 920 (E.D. Wis. 2007); *Schwimmer v. Kaladjian*, 988 F. Supp. 631 (S.D.N.Y. 1997). Since *Schneckloth*, the Court of Appeals for nearly every circuit has adopted and applied the totality of circumstances test to evaluate the voluntariness of one's consent in both civil and criminal cases. *See, e.g., United States v. Lopez*, 437 F.3d 1059, 1063–67 (10th Cir. 2006) (confession involuntary under totality of circumstances); *Kaniff v. United States*, 351 F.3d 780, 785 (7th Cir. 2003) (plaintiff's consent to x-ray voluntary under totality of circumstances); *United States v. Soriano*, 361 F.3d 494, 501–03 (9th Cir. 2003) (under totality of circumstances, mother's consent to search voluntary despite officers' threats to take children if she did not consent); *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003) (confession involuntary under totality of circumstances when resulted from psychological coercion); *Hubbard v. Haley*, 317 F.3d 1245,1252–53 (10th Cir. 2003) (statement to police voluntary under totality of circumstances); *Ferguson v. City of Charleston*, 308 F.3d 380, 402–03 (4th Cir. 2002) (consent to take urine sample involuntary under totality

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IN THE

Supreme Court of the United States

BELINDA DUPUY, ET AL.,
PETITIONERS,

v.

ERWIN MCEWEN, DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES.
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Illinois State Bar Association (the "ISBA") is an organization dedicated to improving the administration of justice. Formed in 1877 by a group of forward-thinking lawyers and judges, the ISBA remains firmly committed to a variety of equal justice initiatives. The ISBA is dedicated to ensuring that State intervention in the protected sphere of family life comports with the rule of law. Accordingly, the ISBA has a strong interest in this Court's review, and ultimate reversal, of the Seventh Circuit's decision in this case.

SUMMARY OF ARGUMENT

The Seventh Circuit's decision threatens to deprive families in Illinois and elsewhere of fundamental Due Process rights that attach when the State seeks to separate children from their parents. The interest of parents in the custody, care, and upbringing of their children is among the oldest and most venerable fundamental rights recognized by this Court. No less vital is the right of children to remain, whenever possible, under the physical and

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[1] Pursuant to Rule 37.2 of the Rules of this Court, counsel of record for both parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Counsel for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief as required by Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

emotional care of their parents. As with the formal removal of a child from the home, the imposition of a "safety plan" in Illinois impinges on both of these rights, often permitting State officials to separate children from their parents for weeks or even months at a time. Yet the Seventh Circuit in this case upheld the policy of the Illinois Department of Children and Family Services ("DCFS"), which routinely imposes safety plans on families based only on the "mere suspicion" of child abuse. Under DCFS's procedures, parents are not entitled to know the details of the allegations against them, and the State provides no mechanism for any type of hearing before a neutral decision maker either before or shortly after a safety plan is imposed.

Review by this Court is urgently needed. The safety plans at issue in this case impact an estimated 10,000 families in Illinois each year. *See* Pet. App. 41a. Moreover, the consequences of the Seventh Circuit's decision will extend far beyond Illinois. For example, of the five states that border Illinois, at least four appear to have implemented safety plan procedures similar to those used by the Illinois DCFS, without any evident Due Process protections.[2]

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[2] *See* Wisconsin Bureau of Programs & Policies, *Child Protective Services: Safety Intervention Standards*, Wisc. DCFS Memo No. 2006-09, at 7, 28 (issued May 2, 2006) *available at* http://dhfs.wisconsin.gov/dcfs_info/ (describing circumstances in which safety plans can be used); Iowa Dep't of Human Servs., *New Child Welfare Service Array: Enhancing Systems Collaboration*, *available at* http://www.dhs.state.ia.us/dhs/dhs_homepage/index.html (same); Mo. Child Welfare Manual § 2, ch. 9.2, *available at* http://www.dss.mo.gov/cd/info/cwmanual/section2/ch9/sec2ch9s

In contrast to Illinois's safety plan procedures, certain other states and localities require state actors to provide evidentiary support for safety plans imposed on families and submit such plans to judicial review.[3] Such safeguards are a constitutional necessity; they should not be a matter of state discretion. Without guidance from the Court, the Seventh Circuit's decision threatens to leave families more vulnerable to potentially indefinite state intrusions without the opportunity for any meaningful hearing or judicial oversight.

This Court's review is particularly appropriate because the Seventh Circuit's decision conflicts with this Court's settled Due Process jurisprudence and is at odds with every other Circuit decision that has addressed Due Process protections in this context. This Court has made clear that when fundamental, constitutionally protected liberty interests are at stake, Due Process requires, at a minimum, notice of the bases for state action and the opportunity for a hearing at a meaningful time and in a meaningful

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ub2.htm (same); Ky. Standards of Practice: Completion of Continuous Quality Assessment, *available at* https://apps.chfs.ky.gov/pandp_process/cqa_sop.htm (same).

[3] *See, e.g.* Me. Dep't of Health & Human Services, *A Guide to Child Protective Services*, *available at* http://www.maine.gov/dhhs/bcfs/handbook.pdf (safety plans implemented only for cases of substantiated child abuse); Allegheny Cty. Dep't of Human Services, *Safety Plans and Interventions*, CYF Memo No. 008 (August 2006), *available at* http://www.dhs.county.allegheny.pa.us/uploadedFiles/DHS/About_DHS/Publications/Resource_Guides/008SafetyPlns.pdf (providing for judicial review of safety plans).

manner. Until now, the Courts of Appeals have uniformly recognized that even temporary deprivations of child custody require a prompt hearing and a stricter standard of proof than "mere suspicion." The Seventh Circuit stands alone in discarding these well-established Due Process protections and allowing state officials to evade even these basic fundamental constitutional safeguards.

Moreover, the Seventh Circuit's only justification for doing away with these constitutional safeguards—that the plaintiff parents had consented to the safety plans and therefore waived any rights to process—conflicts directly with decisions of this Court holding that individuals' waiver of their fundamental Due Process rights cannot be truly voluntary unless the waiver is free of state coercion and knowingly made. Specifically, the lower court's rationale cannot be reconciled with the Court's "unconstitutional conditions" doctrine, which prevents the government from offering an ostensible "benefit" in order to exert overwhelming pressure on individuals to waive their rights. *See United States v. Jackson,* 390 U.S. 570 (1968). In addition to being unconstitutionally coercive, Illinois's safety plan system never ensures that parents' waivers are made knowingly. A defendant who pleads guilty to a crime is at least afforded a hearing before a neutral magistrate who determines whether the plea is entered into knowingly and voluntarily. Notwithstanding the onerous burden safety plans place on families, Illinois affords no such procedural protections to parents who "consent" to them.

The Seventh Circuit has thus sanctioned "voluntary" safety plans as a mechanism for the states to avoid affording families universally recognized constitutional protections. This Court should grant *certiorari* to review the Seventh Circuit's decision and bring it in line with other Courts of Appeals' and this Court's precedents.

ARGUMENT

I. The Seventh Circuit's Decision Conflicts with This Court's Due Process Jurisprudence Requiring Timely Notice and a Meaningful Hearing Whenever the Government Seeks to Deprive Persons of Fundamental Constitutional Interests.

In a long line of cases covering a wide variety of circumstances, this Court has consistently required the government to provide certain basic procedural protections whenever it deprives persons of constitutionally protected liberty and property interests. *See e.g., Jones v. Flowers*, 547 U.S. 220 (2006) (tax sale of property); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (detention of enemy combatants); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (suspension from public school); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (suspension of disability benefits); *Bell v. Burson*, 402 U.S. 535 (1971) (revocation of driver's license and registration); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 341-42 (1969) (garnishment of wages); *Armstrong v. Manzo*, 380 U.S. 545 (1965) (termination of parental rights).

The Seventh Circuit's decision discards this well-settled jurisprudence.

Indeed, familial association and autonomy "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see M.L.B. v. S.L.J.*, 519 U.S 102, 116 (1996) (familial autonomy is of "basic importance in our society" (quotations omitted)). The State triggers Due Process requirements when it impairs the right of parents to control the upbringing of their children and the reciprocal right of children not to be "dislocated from the 'emotional attachments . . . derived from the intimacy of daily association' with their parents." *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (quoting *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977)). Even interference falling short of formal, permanent separation is permissible only to protect the State's compelling interest in ensuring child safety when a parent is unfit. *Troxel*, 530 U.S. at 68-69.

Illinois's imposition of safety plans in this case unquestionably impairs constitutionally protected interests. When confronted with such significant impairments, this Court has consistently held that Due Process requires, at a minimum, notice of the bases for state action and the opportunity for a hearing "at a meaningful time and in a meaningful manner." *Loudermill*, 470 U.S. at 538; *Armstrong*, 380 U.S. at 552. Beyond these basic requirements, the specific amount of process due must be assessed by weighing the nature of the protected interest, the risk of an erroneous deprivation through the

procedures used, the probable value of any additional procedures, and the interests of the government, both in effectuating the deprivation and in maintaining the procedural status quo. *See Mathews*, 424 U.S. at 335.

As a practical matter, the government must virtually always provide notice and an opportunity for a meaningful hearing either before or shortly after any significant deprivation of a constitutionally protected interest. The baseline rule is that significant deprivations of liberty or property require notice and a meaningful hearing prior to the deprivation. *See, e.g.*, *Jones*, 547 U.S. at 223; *Bell*, 402 U.S. at 542; *Goldberg*, 397 U.S. at 263-64; *Sniadach*, 395 U.S. at 341-42; *Armstrong*, 380 U.S. at 552.

Under certain circumstances, usually involving temporary deprivations, the government may substitute a post-deprivation hearing, but only when "accompanied by a substantial assurance that [the deprivation] is not baseless or unwarranted." *FDIC v. Mallen*, 486 U.S. 230, 240 (1988) (temporary suspension of federally regulated employment); *Mathews*, 424 U.S. at 340 (temporary suspension of disability benefits). Even in these situations, however, the government must provide advance notice of the reasons for the deprivation, and the factual bases underlying such reasons. *See Loudermill*, 470 U.S. at 542-46.

Finally, certain "extraordinary" circumstances may justify the postponement of both notice and a

hearing. *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972).[4] Even in such "extraordinary" circumstances, however, notice and a hearing before a neutral decisionmaker must still be provided "promptly" following deprivation. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

The Seventh Circuit did not hold, and there is no indication in the record, that all or even most safety plans are imposed in extraordinary circumstances that would justify postponing both notice and the right to a hearing. Moreover, even where bona fide concerns for child safety and well-being in "emergency" situations do justify a degree of procedural flexibility, *see infra,* Part II, under no circumstances may the State disregard the basic requirements of Due Process altogether. Yet such is the effect of the safety plan framework sanctioned by the Seventh Circuit in this case. Indeed, the Illinois DCFS often separates parents from their children for

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[4] For example, summary seizure of property may sometimes be permissible "to collect internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food." *Fuentes*, 407 U.S. at 92 (footnotes omitted). *But see Jones*, 547 U.S. at 223 (Due Process requires notice and hearing prior to tax sale of property). Warrantless arrests and detention of suspected perpetrators in municipal jails, which implicate Fourth Amendment protections analogous to Due Process, may sometimes be justified to protect public safety. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991). In what is arguably the most extreme case, suspected "enemy combatants" may be detained to ensure that such individuals do not return to battle against the United States in a time of war. *Hamdi*, 542 U.S. at 533.

weeks or even months at a time, and otherwise interferes in family life, without ever informing parents of the allegations against them or presenting those allegations to a neutral decisionmaker. *See* Pet. App. 45a, 50a, 85a, 93a. Such a complete absence of Due Process is plainly unconstitutional.

II. The Seventh Circuit's Decision Is At Odds With Every Other Federal Court of Appeals Decision that Has Addressed Due Process Protections in the Context of Significant State Interference in Family Life.

Every federal Court of Appeals to confront the issue has afforded basic procedural Due Process rights when state and local governments significantly interfere with family life. All parties to this case agree that such interference in family life may sometimes be necessary to protect children. No other Court of Appeals, however, has ever entirely disregarded the procedural Due Process rights of families in such contexts.[5]

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[5] The other Courts of Appeals have addressed the Due Process rights of families in circumstances ranging from truancy and suspected neglect, *see e.g., Jordan ex rel Jordan v. Jackson*, 15 F.3d 333, 336-37 (4th Cir. 1994) (child was home alone), to suspected "emergency" situations where prompt official action may be needed to prevent immediate physical injury to a child, *see, e.g., Hatch v. Dep't for Children, Youth & Their Families*, 274 F.3d 12, 17 (1st Cir. 2001) (child had bruises suggesting possible physical abuse). While most of these cases involve the temporary removal of children from their parents' homes, at least one other Court of Appeals has addressed state efforts to remove parents from their children. *See Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123 (3d Cir. 1997). The *Croft* court could "discern no rational distinction" between

A. The Courts of Appeals Have Uniformly Required Prompt Notice and Post-Deprivation Review of State Action.

Even where immediate interference with family life is justified due to a potential "emergency," Courts of Appeals have uniformly held that Due Process requirements "are not eliminated, but merely postponed." *Weller v. Baltimore Dep't of Social Servs.*, 901 F.2d 387, 393 (4th Cir. 1990) (quotations omitted); *see also Hooks v. Hooks*, 771 F.2d 935, 942 (6th Cir. 1985); *Duchesne*, 566 F.2d at 826. Under no circumstances does the possibility that a child is in imminent danger relieve the State of its obligation to promptly provide parents with notice of the allegations against them and a meaningful opportunity to be heard. *Id.* at 828. It is the State's burden to initiate prompt judicial review: The State "cannot be allowed to take action depriving individuals of a most basic and essential liberty interest which those uneducated and uniformed in legal intricacies may allow to go unchallenged for a long period of time." *Id.*

Thus, the Courts of Appeals have almost always required that a post-deprivation hearing be held within hours or days, *see Jordan ex rel Jordan v. Jackson*, 15 F.3d 333,,351 (4th Cir. 1994) (delay of 65 hours "is near, if not at, the outer limit of permissible delay"); *Berman v. Young*, 291 F.3d 976, 985 (7th Cir. 2002) (describing a 72-hour delay as "rather

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removal of a child and the forced departure of parent, given that both situations involve the forced separation of otherwise intact families. *Id.* at 1126 & n.4.

outrageous"), and not weeks or months.[6] In requiring such speedy review of governmental interference in family life, the Courts of Appeals have been cognizant of the fact that the right to familial integrity carries—in Justice Frankfurter's words—"a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Duchesne*, 566 F.2d at 828 & n.26 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

The lower courts have also noted that prompt notice and a hearing are essential to minimize the risk of an erroneous intervention. As Judge Luttig observed in *Jordan*: "The fact of certain and prompt review by superiors and, indeed, a court, not to mention the scrutiny that parental notification assures, is bound to discipline the exercise of the [the State's] emergency removal power . . . further reducing the risk that the initial removal will be effected without cause." *Jordan*, 15 F.3d at 347. The disciplining effect of a meaningful review is therefore indispensable to the even-handed administration of justice.

Minimizing the risk of erroneous interventions in the parent-child relationship ultimately serves the interests not only of families but also of the State itself as *parens patriae*. There is near universal agreement that children benefit when the integrity of

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[6] *See, e.g., Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634-35 (6th Cir. 2007) (claim of 7-month delay sufficient to state colorable Due Process claim); *Weller*, 901 F.2d at 396 (4-month delay violates Due Process); *Duchesne*, 566 F.2d at 826 (36-month delay violates Due Process).

their families is preserved. Accordingly, "[s]ince the state has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision" that does not wrongly deprive the parent of custody and control. *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981). The mutual goal of promoting every child's welfare is best served by "procedures that promote an accurate determination of whether the natural parents can and will provide a normal home." *Santosky v. Kramer*, 455 U.S. 745, 767 (1982). Without such procedures, there is a greater risk of careless, irresponsible disruptions to family life, which will have a deleterious effect not only on the private interests of individuals but also the public goals of the State itself.

B. The Courts of Appeals Have Required More than "Mere Suspicion" of Neglect or Abuse to Justify State Intervention.

In addition to mandating a prompt hearing, the Courts of Appeals have held that Due Process requires that government officials have a firm basis for believing that abuse is occurring before interfering significantly in the parent-child relationship.

Most Courts of Appeals confronting the issue have held that such a basis must at least rise to the level of a "reasonable and articulable" or "objectively reasonable" suspicion that child abuse has taken or will imminently take place in order for the officials in question to avoid liability. *See, e.g.*, *Hatch v. Dep't for Children, Youth & Their Families*, 274 F.3d 12,

20-21 (1st Cir. 2001); *Brokaw v. Mercer County*, 235 F,.3d 1000, 1019 (7th Cir. 2000); *Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997); *Gottlieb v. County of Orange*, 84 F.3d 511, 517 (2d Cir. 1996); *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1371 (8th Cir. 1996). At least one Court of Appeals has imposed a seemingly more stringent standard, requiring state officials to have "reasonable cause to believe that the child is in imminent danger of serious bodily injury." *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000).[7]

Regardless of the specific standard employed, some threshold test is necessary to demarcate the point at which the family's interests in remaining together as a family are outweighed by the State's interests as *parens patriae*. *See Hatch*, 274 F.3d at 21; *Thomason*, 85 F.3d at 1373. Like the requirements of prompt notice and a hearing, such a threshold test forces state officials to conduct at least a "minimally adequate" investigation before interfering with a parent's control of his or her children. *Doe v. Hennepin County*, 858 F.2d 1325,

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[7] This inquiry is somewhat analogous to a Fourth Amendment probable cause or reasonable suspicion determination by a police officer conducting a warrantless search or arrest. *Cf. Texas v. Brown*, 460 U.S. 730, 742 (1983) (probable cause for search); *Terry v. Ohio*, 392 U.S. 1, 22-23 (1968) (reasonable suspicion for stop-and-frisk); *Beck v. Ohio*, 379 U.S. 89, 91-92 (1964) (probable cause for arrest). As with an individual's bodily and personal integrity, state officials cannot interfere with the integrity of a parent-child relationship without some reasonable basis to believe that a governmental invasion is warranted.

1329-30 (8th Cir. 1988) (Henley, J., concurring). Such investigations in turn help to prevent inappropriate or irresponsible interventions. In *Wallis*, for example, children were removed from their home based solely on allegations of Satan worship by a mentally disturbed relative who had a history of making false reports. *See Wallis*, 202 F.3d at 1138-39. In *Croft*, state intervention was triggered by an uncorroborated anonymous tip that itself constituted only hearsay. *See Croft*, 103 F.3d at 1126-27. In both cases, the courts held that family life could not be disrupted in accordance with Due Process based on such tenuous allegations. *See Wallis*, 202 F.3d at 1139; *Croft*, 103 F.3d at 1127.

Whether deprivation of the right to familial integrity takes the form of forced removal or a "voluntary" safety plan, Due Process requires the State to act reasonably and on reliable information when taking action that significantly interferes with the relationship between a child and his or her parents. The Seventh Circuit's decision sanctions a constitutionally impermissible end-run around these well-established Due Process requirements by requiring no evidentiary showing by the State to justify implemention of a safety plan.

III. The Seventh Circuit's Decision Conflicts With This Court's Precedents Holding that Waivers of Fundamental Due Process Rights Must be Free of Undue State Burdens and Made Knowingly and Voluntarily.

Illinois attempts to shield its practices from judicial oversight by cloaking safety plans in the

legal fiction of the parents' "consent," an argument the Seventh Circuit adopted as the core rationale for its decision. *See* Pet. App. 13a-17a. The Seventh Circuit's reasoning is fundamentally incompatible with both the "unconstitutional conditions" doctrine and established precedents regarding the requirements for truly voluntary waiver of procedural Due Process rights.

A. The Seventh Circuit's Decision Is At Odds With This Court's "Unconstitutional Conditions" Jurisprudence.

Contrary to the Seventh Circuit's view, this Court has long recognized that individuals may, in fact, be "disadvantaged by having more rather than fewer options," Pet. App. 16a, when the government uses its overwhelming leverage to induce them into sacrificing constitutional rights in exchange for a particular "benefit." *See Jackson,* 390 U.S. at 581; *Frost v. RR Comm'n of Cal.*, 271 U.S. 583, 593 (1926). The "choice" offered in such cases is not akin to deciding between a martini and a manhattan, as the Seventh Circuit characterized the parents' dilemma in this case, Pet. App. 16a, but rather to choosing "between the rock and the whirlpool." *Frost*, 271 U.S. at 593.

This Court explained the pernicious nature of such a choice in *Jackson.* The *Jackson* Court invalidated a provision of the Federal Kidnapping Act that authorized the death penalty after a jury trial, but contained no procedure for imposing the death penalty upon a defendant who waived his or her right to a jury trial or pleaded guilty. This Court

held that the death penalty provision was unconstitutional because it had the "inevitable effect" of "discourag[ing] assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." *Jackson*, 390 U.S. at 581 (footnote omitted). This Court explained that "the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right." *Id.* at 583; *see also North Carolina v. Pearce*, 395 U.S. 711 (1969) (holding that the State may not burden appellate rights by imposing harsher sentence on remand).

The risk of indefinitely losing a child similarly chills the parents' right to retain custody of their children and to maintain their innocence of the charges against them. Here, as in *Jackson*, the State offers an ostensible "benefit," namely implementation of a safety plan in lieu of protective custody, but only if parents agree not to assert their own and their children's substantive and procedural Due Process rights. There can be no stronger evidence of a chilling or deterrent effect on basic constitutional rights than the fact that every single parent faced with the offer of safety plan "chose" to waive his or her Due Process rights. *See* Pet. App. 44a, 94a. The State's ability to exert this kind of overwhelming pressure on parents is all the more problematic in light of the exceptionally low "mere suspicion" threshold for state action.

In order for the safety plan scheme to pass constitutional muster, Due Process protections may not attach exclusively to the "option" any reasonable parent would find unthinkable. By ensuring that parents will never reject a safety plan, the State improperly circumvents the procedural Due Process requirements that currently attach only to protective custody.[8] Such a system provides an incentive for arbitrary government action—a disservice to children, families, and the State itself. Only comparable Due Process protections for the imposition of safety plans and protective custody would uphold the true voluntariness of a parent's consent to a safety plan, limit the chance of erroneous intervention, and ensure that DCFS investigators do not come to view safety plans as an acceptable alternative to well-established Due Process requirements.

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[8] The procedural requirements for taking a child into protective custody are enshrined in the Abused and Neglected Child Reporting Act, 325 ILCS 5/5, and the Juvenile Court Act, 705 ILCS 405/2-7(1), 405/2-8, 405/2-9. These statutes together provide that if the State of Illinois "(1) . . . has reason to believe that the child cannot be cared for at home or in the custody of the person responsible for the child's welfare without endangering the child's health or safety; and (2) there is not time to apply for a court order . . . for temporary custody of the child," the State can immediately take the child into "temporary protective custody," 325 ILCS 5/5, but there is a right to a judicial hearing within 48 hours, 705 ILCS 405/2-9(1), and (3).

B. The Seventh Circuit's Decision Contradicts this Court's Precedent Requiring Procedures to Ensure that Waiver is Made Knowingly and Voluntarily.

DCFS's extraction of parents' consent suffers from another serious constitutional flaw. Under the framework endorsed by the Seventh Circuit, the DCFS never informs parents of the rights they are waiving by agreeing to a safety plan. *See* Pet. App. 45a, 50a. In order for their waiver of rights to be knowing and voluntary, parents must be informed of the law in relation to the facts alleged against them. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (citing *McCarthy v. United States*, 394 U.S. 459, 467 (1969)).

The Seventh Circuit's comparisons to plea bargaining only illuminate the constitutional flaws in DCFS's procedures. In the Seventh Circuit's view, a parent who agrees to a safety plan in the hope of avoiding a custody hearing is in the same position as a criminal defendant who pleads guilty "to obtain a more lenient outcome than he could expect if he went to trial." Pet. App. 17a. According to the Seventh Circuit, "[b]ecause the safety plan is voluntary, no hearing of any kind is necessary; hearings are required for deprivations ordered over objection, not for steps authorized by consent." *Id.* at 15a.

In making this analogy, the Seventh Circuit overlooked the robust set of procedural rights that criminal defendants are afforded even when they plead guilty. A defendant who pleads guilty is entitled to a hearing to ensure that the waiver of his

or her constitutional rights is knowing and voluntary, and not the result of improper government threats or promises. Federal Rule of Criminal Procedure 11 provides that before the court accepts a guilty plea, "the court must address the defendant personally in open court" and "inform the defendant of, and determine that the defendant understands" the Fifth and Sixth Amendment rights he or she will be waiving by pleading guilty. Fed. R. Crim. P. 11(b). The court must also "address the defendant personally in open court [and] determine that the plea is voluntary" and did not result from force or unlawful threats, and must determine that the plea is supported by an actual basis in fact. Fed. R. Crim. P. 11(b), (c). These procedures—which are designed to ensure that a plea is knowing and voluntary—codify constitutional requirements that apply with equal force to the states. *See Boykin*, 395 U.S. at 243; *id.* at 245 (Harlan, J., dissenting).[9]

In stating that no hearing is necessary because the safety plans are voluntary, the Seventh Circuit thus got the analysis backwards. A hearing is necessary in order to determine whether the safety plan is truly knowing and voluntary in the first

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[9] The Seventh Circuit also compared acceptance of the safety plan to a civil litigant's acceptance of a settlement. But this Court has made clear that child custody and control cases require far weightier protections than typical civil litigation over money damages. *See Santosky v. Kramer*, 455 U.S. 745, 755 (1982). Indeed these proceedings may "bear[] many of the indicia of a criminal trial." *Id.* at 762; *cf. Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring) (stating that right to familial integrity carries "momentum for respect" far greater than any that for any shifting economic entitlement).

place. "Requiring this examination of the relation between the law and the acts the defendant admits to having committed is designed to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *McCarthy v. United States*, 394 U.S. 459, 467 (1969) (quotation marks, citation, and footnote omitted). Like a criminal defendant deciding whether or not to plead guilty, in order to assess the pros and cons of accepting a safety plan, a parent would need to know his or her rights and the limits of the DCFS's removal power. Parents are unable to "stand on their rights" when they do not know what those rights are.

The record shows that parents subjected to safety plans were not in fact apprised of their rights. Pet. App. 41a, 45a-46a. DCFS investigators do not inform the parents who are the target of the investigation of DCFS's basis for the safety plan demand, including the safety factors DCFS found to be present and the reasons why it concluded the child is "unsafe." *Id.* at 45a. Nor do they explain to parents the legal procedures DCFS would need to follow or the quantity of evidence that would be required for the agency lawfully to remove a child from the home. *Id.* at 45a, 95a. Without being informed that the law does not allow the State to take a child into custody on the basis of mere suspicion, a parent's agreement to a safety plan is not knowing and voluntary. "Ignorance, incomprehension, coercion, terror, inducements,

subtle or blatant threats might be a perfect cover-up of unconstitutionality." *Boykin*, 395 U.S. at 242-43.

In sum, the Seventh Circuit has sanctioned a deprivation of the substantive Due Process rights of parents and children alike without any procedural safeguards and based solely on the unsustainable legal fiction of parental consent. The decision is incompatible with this Court's jurisprudence and at odds with every Court of Appeals that has opined on the procedural Due Process rights of families in the face of state intervention. It should be reversed.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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IN THE

Supreme Court of the United States

BELINDA DUPUY, *et al.*,
Petitioners,

v.

ERWIN MCEWEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN PSYCHOANALYTIC ASSOCIATION AND THE CHICAGO PSYCHOANALYTIC SOCIETY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN PSYCHOANALYTIC ASSOCIATION AND THE CHICAGO PSYCHOANALYTIC SOCIETY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amicus curiae* brief is submitted in support of petitioners.[1]

INTEREST OF THE *AMICI CURIAE*

The American Psychoanalytic Association ("APSAA") is a national not-for-profit association focused on researching mental health issues and educating the public about them. The members of APSAA are committed to both protecting children and securing parents' fundamental rights.

The Chicago Psychoanalytic Society is dedicated to advancing the field of psychoanalysis by educating the public and promoting research by its members.

APSAA and the Chicago Psychoanalytic Society both have a significant interest in the resolution of the question whether the Due Process Clause of the Fourteenth Amendment has been violated by the Illinois Department of Children and Family Services ("DCFS") policies and practices.

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel contributed monetarily to the brief.

INTRODUCTION

The purpose of this amicus brief is to provide the scientific context necessary to understand the fundamental error of the decision below. In the view of the U.S. Court of Appeals for the Seventh Circuit, a parent's decision to accept the onerous conditions that a state agency may place on allowing a child to remain in his or her home is no different in kind from the same parent's decision to choose between a "martini [and] a manhattan." Pet. App. 16. That abstracted view of human behavior is inconsistent with decades of scientific research proving that the "voluntariness" of a parent's decision in such circumstances is deeply flawed and the resulting choices often do not reflect a "choice" in any meaningful sense of the word.

SUMMARY OF ARGUMENT

If a state family services agency has reason to believe that a child may be unsafe, it typically offers parents a "safety plan." Under this approach, the agency threatens to remove the child from the home unless the parent suspected of abuse agrees to leave the home. Safety plans affect tens of thousands of families each year. Almost all parents offered a safety plan accept it, even though most of the resulting investigations reveal ***no evidence*** of child abuse or neglect. Pet. App. 32.

The fundamental submission of amici is that a parent who accedes to a "safety plan" is often not making a decision that is "voluntary" in any meaningful sense of the word. Instead, acquiescence to the plan represents a coerced visceral response to

a Hobson's choice: either leave the home and abandon the child or send the child to live with strangers in an unfamiliar environment. The biological and psychological stresses associated with this decision undermine the ability of many parents to make a choice that reflects their best judgment. The safety plan often elicits an instinctive response in parents to protect their children and avoid the children's separation from the family by accepting the plan. Several other factors also generally confound the voluntariness of parental decision-making here: the decision usually is made in the face of a show of authority by the state, under time pressure, and without the benefit of information about alternatives or the evidence against them. For these reasons, a parent's agreement to a safety plan cannot be presumed to be the product of a rational, voluntary choice.

Granting a hearing to allow parents to contest the safety plan is the best way to balance the safety of children and the fundamental rights of parents and children to associate without interference from the state. Parental rights cannot be denied without an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal citation omitted). Similarly, a child's right to be raised by his or her parents cannot be denied without an opportunity to be heard in a meaningful way. *See id.* Compelling a parent to leave the home amounts to a stark and serious infringement of the right to familial integrity.[2] The Due Process Clause requires

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[2] The right to familial integrity is fundamental, including the right of parents to the care, custody, and control of their

appropriate procedures to assure that the State takes such action based on accurate information duly tested by the adversarial process.

The Seventh Circuit erred in holding that a parent's decision to accept a safety plan is necessarily "voluntary" because "[t]he state does not force a safety plan on the parents; it merely offers it." Pet. App. 14. Consistent with the scientific evidence, the district court had properly concluded that the perceived threat of removing a child from the home is coercive and prevents parents from making a voluntary decision. Pet. App. 95. The district court reached its decision after carefully considering the totality of the circumstances, using the appropriate due process test for "voluntariness" outlined by this Court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).[3] The Seventh Circuit's *ipse*

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children. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'") (internal citation omitted); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"). The Court has further recognized that children share the same fundamental right. *See Santosky v. Kramer*, 455 U.S. 745, 760 (1982) ("[U]ntil the State ***proves*** parental unfitness, the child and his parents ***share*** a vital interest in preventing erroneous termination of their natural relationship.") (emphases added).

[3] The district court found that the safety plans implemented by DCFS were not voluntary where investigators "made threat[s] sufficient to deem the family's agreement [to safety plans] coerced." Pet. App. 94. The court concluded that where there is a perceived threat of removal of a child from the home, that action in of itself is coercive. *Id.* ("[W]hen an

dixit reasoning is at odds with well-documented scientific research regarding human decision making.[4]

ARGUMENT

This Court has held that voluntariness for purposes of constitutional analysis is "a question of fact to be determined from all the circumstances." *See Schneckloth v. Bustamonte*, 412 U.S. 218, 224, 248-49 (1973). A crucial aspect of that inquiry is the "psychological impact" of the circumstances on the decision-maker, and the "possibly vulnerable subjective state of the person who consents." *Id.* at 229. For that reason, psychological and behavioral science research should play an integral role in the inquiry because it provides extensive guidance regarding the psychological impact and subjective state of the decision-maker who gave consent. The Seventh Circuit's assumption that *all* parents agreeing to safety plans are acting voluntarily is untenable.

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investigator expressly or implicitly conveys that failure to accept a plan will result in the removal of the children for more than a brief or temporary period of time, it constitutes a threat sufficient to deem the family's agreement coerced."). In particular, "agreement to the plans at issue here was secured in a coercive manner under the investigator's express or implied threat of protective custody lasting more than a brief or temporary period of time." *Id.* at 95.

[4] It also creates a split with the Third Circuit. *See Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123, 1125 n.1 (3d Cir. 1997).

I. *SCHNECKCLOTH* REQUIRES AN INQUIRY INTO THE PARENT'S STATE OF MIND IN AGREEING TO A SAFETY PLAN

This Court has recognized that there is "no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen," and has held that voluntariness is "a question of fact to be determined from all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 224, 248-49 (1973).[5] Accordingly, in evaluating the voluntariness of consent decisions and of confessions, a court must consider numerous factors including unequal bargaining power, insufficient access to relevant information, the age of the accused, lack of education, level of intelligence, lack of advice about constitutional rights, use of physical punishment, the "psychological impact" of the situation on the decision-maker, and the "possibly vulnerable subjective state of the person who consents." *Id.* at 224 (collecting cases), 229. A determination of voluntariness does not turn on "the presence or absence of a single controlling criterion." *Id.* at 226.[6]

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[5] *See also, e.g., D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 186-88 (1972) (looking to circumstances surrounding waiver of rights to prejudgment notice and hearing in civil context to determine whether waiver was knowing, intelligent, and voluntary); *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (assessing circumstances of confession, including police threats to take accused's children away if she did not cooperate, in determining that confession was "not voluntary, but coerced").

[6] The Court has further recognized that a meaningless choice is no choice at all. *See Frost & Frost Trucking Co. v.*

The Seventh Circuit ignored this clear mandate and held without meaningful analysis that safety plans are voluntary as a matter of law because "[t]he state does not force a safety plan on the parents; it merely offers it." Pet. App. 14. Concluding that a decision to enter a safety plan is voluntary simply because it is technically optional misses the point of this Court's decisions on voluntariness. For example, no one is required to consent to a search; the mere fact that a search is technically optional, however, has not led this Court to conclude that all consented-to governmental searches are voluntary. *See, e.g.*, *Schneckloth*, 412 U.S. at 248-49. The inquiry required by this Court's prior decisions necessitates consideration of the circumstances impacting voluntariness, including parents' access to information, the balance of power, and the biological and psychological implications of parent-child separation.

II. SCIENTIFIC RESEARCH DEMONSTRATES THAT A PARENT'S DECISION TO ACCEPT A SAFETY PLAN IS OFTEN NOT VOLUNTARY

According to psychologists, informed consent -- the scientific analogue to the law's concept of "voluntariness" -- can exist only if a person (1) receives adequate information about the decision, (2) has the capacity to understand that information, and

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R.R. Comm'n of Cal., 271 U.S. 583, 593 (1926) (holding the "option to forego a privilege which may be vital to [petitioner's] livelihood or submit to a requirement which may constitute an intolerable burden" was "[i]n reality . . . no choice"); *see also e.g.*, *Marchetti v. United States*, 390 U.S. 39 (1968).

(3) is free to make the choice.[7] Research on informed consent repeatedly shows that people under stress find it particularly difficult to give informed consent, and that obtaining truly informed consent requires extended and skillful communication, appropriate to the totality of the circumstances, between the party giving it and party obtaining it.[8] Parents' ability to give informed consent is usually undermined by the stressful circumstances that come with a decision to accept or reject safety plans. Moreover, the effect of these stressors is cumulative, so the impact of any single circumstance is greater than it would be in isolation.[9] As we show below, the circumstances surrounding the presentation of safety plans to parents do not satisfy the three scientific criteria for inferring that parents' decisions to accept the plans are the product of real consent.

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[7] *See* Jan M. Benedict et al., *Validity and Consequence of Informed Consent in Pediatric Bone Marrow Transplantation: The Parental Experience*, 49 Pediatric Blood Cancer 846 (2007).

[8] *See also* Harold J. Bursztajn et al., *Medical Choices, Medical Chances: How Patients, Families, and Physicians Can Cope With Uncertainty* (1981); Laura B. Dunn et al., *Assessing Decisional Capacity for Clinical Research or Treatment: A Review of Instruments*, 163 American Journal of Psychiatry 1323 (2006); Margaret Holmes-Rovner & Celia E. Wills, *Improving Informed Consent: Insights From Behavioral Decision Research*, 40:9 Medical Care V30-V38 (2002).

[9] *See* Bruce S. McEwen et al., *The Role of Adrenocorticoids as Modulators of Immune Function in Health and Disease: Neural, Endocrine and Immune Interactions*, 23 Brain Research Reviews 79 (1997); Bruce S. McEwen, *Protective and Damaging Effects of Stress Mediators*, 338:3 New England Journal of Medicine 171 (1998).

A. Parents Often Lack Adequate Information To Make a Voluntary Decision

A decision-maker must have adequate material information to give valid consent. Rational choices require decisions to be based on "the weighing of the utilities and probabilities associated with all available courses of action." *See* Giora Keinan, *Decision Making Under Stress: Scanning of Alternatives Under Controllable and Uncontrollable Threats*, 52 Journal of Personality and Social Psychology 639 (1987). Moreover, recent behavioral science research demonstrates that the way a decision is framed has a significant effect on the choice people make. Typically, people tend to be risk-averse to secure a certain gain, but are risk-seeking to avoid a certain loss. *See* Daniel Kahneman & Shane Frederick, *Frames and Brains: Elicitation and Control of Response Tendencies*, 11 Trends in Cognitive Sciences 45 (2007).

Parents faced with a safety plan may well not have adequate information to give valid consent. Here, for example, DCFS investigators failed to disclose key pieces of information to parents, including plan terms, the bases for offering a plan, alternatives to safety plans, and the possible consequences of rejecting a plan. Pet. App. 41. The district court found that in most instances DCFS investigators presented a proposed safety plan to parents with little or no discussion of plan terms or alternatives. Pet. App. 41. DCFS investigators are not obligated to, and often do not, present or explain important information like relevant procedural protections and the evidence of abuse justifying the

State's investigation. *Id.* The paperwork accompanying safety plans makes no mention of the legal standards or procedures DCFS must follow to remove a child from the home. *Id.*

This lack of relevant information is exacerbated by the biased and self-serving statements frequently made by investigators and contained in the plans presented to parents. Investigators often verbally threaten to remove children if a parent does not agree to the safety plan. *Id.* at 44. The plan itself warns that failure to agree may lead to placement of the child in protective custody or a referral to the State attorney's office for a court order to remove the child. *Id.*

The damage caused by the lack of relevant information is magnified by the "framing effect." Parents just made aware that their children may have been abused will view a safety plan as a way to ensure that a child will stay at home. Rejecting the safety plan is risky because if DCFS finds the abuse allegations are unfounded, both parent and child can stay home, but if DCFS does find evidence of abuse, the child will be taken into protective custody. Because of the way the choice has been framed, parents not surprisingly seek this certain (if small) gain rather than choose the riskier path and reject the safety plan.

Parents forced to make a decision with little information—all of which is skewed in favor of the State's interests—are making effectively no decision at all.

B. Parents Often Lack the Psychological Capacity to Make a Voluntary Decision

In addition to failures of information, a parent's decision to accept a safety plan is undermined by various other features of the decision that may work together to render the decision involuntary.

1. Unique Features of the Relationship between Parents and their Children Preclude Informed Consent

Several factors rooted in parental biology and psychology make it unlikely that parents have the capacity to make a voluntary decision about whether to accept a safety plan.

The biological and psychological elements of the parent-child relationship make demands for decisions involving separation of children from parents inherently coercive. Children are physically immature for a long period of time and depend on an adult's care and protection. John Bowlby, *Separation, Anxiety, and Anger: Attachment and Loss* (Vol. 2, 1973). Parents have a corresponding instinctual drive to care for their children and protect them from danger. *Id.* Numerous studies have tested Bowlby's attachment theory.[10] They

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[10] *See* Helen Barett, *Parents and Children: Facts and Fallacies about Attachment Theory*, 16 Journal of Family Health Care 3 (2006); Paul C. Notaro & Brenda L. Volling, *Parental Responsiveness and Infant-Parent Attachment: A Replication Study with Fathers and Mothers*, 22 Infant Behavior and Development 345 (1999); John Bowlby,

showed that children separated from parents acted out with great physical distress aimed at reuniting them with their parents. Parents responded to separation with intense efforts to locate their children. The observed reactions to separation were visceral, not the product of reasoned analysis.

The parents' response in these studies appears to have a biological basis. The scientific community widely accepts that there are specific hormones, such as oxytocin, and brain functions of the limbic system driving parents' attachment to and protection of their children. Moreover, these structures and functions are connected with, and therefore can activate, the areas of the brain associated with responses to stressful situations.[11]

In particular, parents faced with possible separation from their children respond with intense states of physiological arousal akin to the physical response to dangerous situations. This response, first identified almost a century ago and referred to as the "fight or flight" response, has been demonstrated to have a clear basis in normal brain function.[12] As a result, brain functioning shifts,

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Attachment and Loss: Retrospect and Prospect, 52 American Journal of Orthopsychiatry 664 (1982).

[11] *See* James F. Leckman et al., *Primary Parental Preoccupation: Circuits, Genes, and the Crucial Role of the Environment*, 111 Journal of Neural Transmission 753 (2004); Alison S. Fleming et al., *Cortisol, Hedonics, and Maternal Responsiveness in Human Mothers*, 32 Hormones and Behavior 85 (1997).

[12] Walter B. Cannon, *Bodily Changes in Pain, Hunger, Fear, and Rage: An Account of Recent Researches into the Function of Emotional Excitement* (1929); Joseph LeDoux, *The*

helping the individual make very rapid decisions in the face of perceived danger. In these states it becomes very hard to think clearly, ideas of taking physical action to protect against danger block out more elaborate and rational thought, and attention becomes narrowly focused on dealing with the immediate danger.

Parents also experience strong psychological responses to the prospect of separation from their children. *See* Cathy R. Schen, *When Mothers Leave their Children Behind*, 13 Harvard Review of Psychiatry 233 (2005). Research shows that parents respond to separations of even short periods of known duration with vigilance and concern. *See, e.g.*, Carl Corter & Jane Bow, *The Mother's Response to Separation as a Function of Her Infant's Sex and Vocal Distress*, 47 Child Development 872 (1976). The record indicates that parents typically have far more severe responses to proposed safety plans, which often have indefinite time frames, or sometimes fail to state any duration at all. Pet. App. 48.

The threat of separation or harm to a child brought by a DCFS investigator triggers this instinctive parental response to eliminate the threat of separation and reduce danger to the child.

2. The Seriousness of the Accusations Often Impairs Parents' Capacity to Make a Voluntary Choice

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Emotional Brain: The Mysterious Underpinnings of Emotional Life (1998).

The seriousness of an accusation of abuse or neglect often impairs a parent's ability to make a voluntary decision. Most parents are profoundly upset to learn that their child may have been abused or neglected and that a spouse or relative is suspected. Expert Report of Robert M. Galatzer-Levy at 13.[13] They experience intense emotions, including concern for the well-being of the child, suspicion, anger, and fear towards the alleged perpetrator, and concern over social stigmatization. Expert Report of Robert M. Galatzer-Levy at 13-15. Research shows that such severe stress produces a state of "hypervigilance" in the individual, and decision-making becomes irrationally "hasty, disorganized, and incomplete . . . leading to faulty decisions and post-decisional regret." Keinan, *supra*, at 639.

3. Parents Usually Face Time Pressure to Make a Decision, which Reduces Their Capacity to Consent

The short timeframe for parents to decide usually affects their ability to make a voluntary choice. Expert Report of Robert M. Galatzer-Levy at 12. Safety plans generally are implemented within 48 hours of the initial call to a DCFS hotline. Pet. App. 46. Research shows that when decisions must be made under time constraints, decision-makers do not think faster, but instead consider less information. *See* Mieneke W.H. Weenig and Marleen Maarleveld, *The Impact of Time Constraint on Information Search Strategies in Complex Choice Tasks*, 23

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[13] The Expert Report of Robert M. Galatzer-Levy will be made available to the Court upon request.

Journal of Economic Psychology 689 (2002). Parents faced with the "choice" of entering into a safety plan generally are not capable of making an informed, rational decision in a short time frame and without the ability to seek legal advice. Expert Report of Robert M. Galatzer-Levy at 12.

These observed lapses in rationality are associated with a shift in brain activity from the cerebral cortex, which is active during rational thought, to the limbic system, a set of brain structures associated with emotions and fear. *See* Benedetto De Martino et al., *Frames, Biases, and Rational Decision-Making in the Human Brain*, 313 Science 684 (2006). Studies of a large variety of situations indicate that individuals required to make decisions quickly or under conditions of uncertainty abandon ordinary rationality in favor of heuristics and short-cuts. The resulting decisions are not always rational, but they are made using available information in the time available. *See* Daniel Kahneman et al., *Judgment Under Uncertainty: Heuristics and Biases* (1982).

Research shows that severe stress causes the individual to forego reasoned decision-making, which customarily involves the orderly and careful evaluation of alternatives. Instead, persons under stress reach decisions before they have considered all available alternatives, consider alternatives in a nonsystematic, disorganized fashion, and devote insufficient time to the consideration of each alternative. *See* Keinan, *supra*, at 639.

In this case, parents suddenly confronted with DCFS workers usually must make a quick,

uninformed decision with weighty consequences. Many of these decisions will be heavily influenced by the fact that an authority figure is present in the parent's home and urging the parent to accept a safety plan. Parents presented with safety plans have also experienced the same shift in brain activity impairing their capacity for rational thought. Expert Report of Robert M. Galatzer-Levy at 19-22.

C. Parents Often Feel They Lack the Freedom to Make a Voluntary Decision

An additional factor that often prevents a voluntary parental decision is the perceived power imbalance between government officials and parents. Parents normally view state officials as wielding significant authority over them. As a result, parents effectively lack the freedom to make a choice about whether to accept a safety plan. Psychological research confirms that individuals typically comply with authority figures in stressful situations.[14]

Recent studies establish that when faced with an interaction with child protective services, parents uniformly perceive a power imbalance. Gary C. Dumbrill, *Parental Experience of Child Protection*

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[14] Stanley Milgram, *Behavioral Study of Obedience*, 67 Journal of Abnormal and Social Psychology 371 (1963) (showing that many people will make irrational decisions that they would not otherwise make because they were obeying authority figures). *See also* Expert Report of Robert M. Galatzer-Levy at 12, 17-18; Tr. at 1043, 1052; Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (2007).

Intervention: A Qualitative Study, 30 Child Abuse & Neglect 27 (2006). This study notes that parents were skeptical that the system worked in the interest of their children and believed case workers either had preconceived notions about the allegations or provided the parents with no opportunity to challenge the allegations or open a dialogue. *Id.* Moreover, parents felt they were poorly equipped to challenge child protective services due to lack of resources and lack of emotional energy; and many believed workers had the power to impose changes even though they were illogical or not in the best interests of the child. These fears existed even when allegations against the parents had no basis in fact. *Id.*

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As the above discussion demonstrates, the decision to accept a safety plan bears no serious resemblance to a choice of pre-dinner drink. A voluntary decision requires adequate information, the psychological strength to process that information, and the confidence to act on the resulting choice. The guest who selects a martini does so aware of all relevant facts, able to understand the facts, and free to make a choice of drink. In sharp contrast, the parent facing the choice of agreeing to a safety plan lacks relevant material information, is inundated with biological responses to the threat of child removal that render accurate processing of the information difficult, and are often intimidated by the overwhelming power of the state agency presenting the plan.

III. THE COMMON LAW CHARACTERIZES AGREEMENTS AS INVOLUNTARY IN SIMILAR CIRCUMSTANCES

In two similar situations, the common law recognizes that a person's consent is not truly given unless it is based on an understanding of the material facts, in a rational state of mind, and unfettered by coercion. According to common law precedent, a patient's acquiescence to a medical procedure does not constitute informed consent if doctors have not informed the patient of the risks. So too, a contract is not entered into voluntarily when a powerful party extracts grossly unfair and inflexible contract terms from a weaker party through contracts of adhesion. The standards in these cases resemble this Court's analysis in *Schneckloth* and the scientific criteria for valid consent. Similar analysis should apply to consent to safety plans.

A. Patients Can Give Informed Consent to Medical Procedures Only If They Receive Adequate Information about the Procedure, Its Risks, and Alternatives

A doctor generally must disclose to a patient the nature and probable consequences of a contemplated medical procedure, as well as material risks and alternatives. This allows the patient to make an intelligent and informed choice about undertaking the treatment. *See Bang v. Charles T. Miller Hosp.*, 88 N.W.2d 186, 190 (Minn. 1958). A doctor's failure to properly disclose means the patient's consent is ineffective and does not represent a voluntary choice by the patient. *See Florida v. Presidential Women's*

Ctr., 937 So. 2d 114, 116 (Fla. 2006); *Landon v. Zorn*, 884 A.2d 142, 155-56 (Md. 2005) (discussing informed consent standard and citing to the seminal case of *Sard v. Hardy*, 379 A.2d 1014 (Md. 1977)); *Kenny v. Wepman*, 753 A.2d 924, 926 (R.I. 2000); *Bartal v. Brower*, 993 P.2d 629, 634 (Kan. 1999); *see also Cruzan ex rel Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 269-78 (1990) (discussing the common law doctrine of informed consent in examining the right to refuse treatment).

The duty to disclose arises from the asymmetric nature of the physician-patient relationship, with some courts recognizing a fiduciary quality to the relationship, *Woods v. Brumlop*, 377 P.2d 520, 524-25 (N.M. 1962), and others acknowledging that a patient is completely dependent upon the knowledge and skill of the physician to make decisions about medical procedures. *Cobbs v. Grant*, 502 P.2d 1, 9-10 (Cal. 1972).

While the nature and scope of disclosure vary by state, the Joint Commission on the Accreditation of Healthcare Organizations defines informed consent as:

> Agreement or permission accompanied by full notice about what is being consented to. A patient must be apprised of the nature, risks, and alternatives of a medical procedure or treatment before the physician or other health care professional begins any such course. After receiving this information, the patient then either consents to or refuses such a procedure

> or treatment. The patient should not be subjected to any procedure without his [or her] voluntary, competent, and understanding consent . . . Where medically significant alternatives for care or treatment exist, the patient shall be so informed.

Hospital Accreditation Standards 398 (JCAHO 2004).

The decision about a safety plan is equally serious and traumatic as a decision on a medical procedure, and is complicated further by confounding factors such as the parents' biological and psychological imperatives, the seriousness of accusations of abuse or neglect, and the duration of time in which to make the decision. It also involves parties of disproportionate negotiating leverage and with asymmetrical access to information. The same factors that vitiate consent in the context of medical procedures bolster the notion that parents' agreement to safety plans can be involuntary.

B. Factors that Contribute to the Finding that a Contract Is Unconscionable Are Present in the Context of Safety Plans

A finding that a contract is unconscionable is, in effect, a finding that the contract was entered into involuntarily. Traditionally, a contract was said to be unconscionable if it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Hume v. United States*, 132 U.S. 406, 411 (1889) (*quoting Earl of Chesterfield v.*

Janssen, 28 Eng. Rep. 82, 100 (1750)). Agreements can be held unconscionable for either substantive or procedural defects. The purpose of the doctrine is "to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in meaningful fashion." *See* 8 *Williston on Contracts* § 18:8 (4th ed. 1998) (quoting *Kugler v. Romain*, 279 A.2d 640, 652 (N.J. 1971)). Three procedural factors that contribute to the finding of unconscionability are present in the context of safety plans.

First, gross inequality of bargaining power between the parties can be evidence of an unconscionable agreement. *See, e.g., Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). *See also* Restatement (Second) of Contracts § 208(d) (1979). Just as Mrs. Williams had little power to bargain with the Walker-Thomas Furniture Company for better credit terms, parents presented with a safety plan have little power to bargain with DCFS workers. DCFS workers usually do not give parents the opportunity to suggest changes to the proposed safety plan. If parents do not agree to a safety plan, there is a substantial likelihood that their children will be placed in protective custody, and a possibility that the matter will be referred to the state's attorney. Pet. App. 93-94. Even though both parents and Mrs. Williams nominally can choose whether to enter into the agreement, the meaningfulness of that choice is negated by the gross inequality of bargaining power between the parties. *See id.*

Second, contract terms that limit one party's ability to seek remedies often are viewed as indicia of unconscionability. *See generally* 8 *Williston on Contracts* § 18:13 (4th ed. 1998). For example, under the Uniform Commercial Code, warranty terms purporting to limit consequential damages for personal injury resulting from consumer goods are prima facie unconscionable. *See* U.C.C. § 2-719(3) (2004). When parents agree to safety plans, they forfeit the right to challenge DCFS findings, and the safety plan itself, in subsequent hearings. Pet. App. 50.

Finally, inequality in bargaining power and terms to limit remedies are particularly problematic when the contract is offered on a take-it-or-leave-it basis. Contracts of adhesion receive greater scrutiny under these circumstances because the lack of negotiation about individual terms provides further evidence that the contract was not a voluntary, bargained-for exchange. *See, e.g., Walker-Thomas*, 350 F.2d at 449-450 (holding that consent was not voluntarily given to a standard form contract when there was gross inequality in bargaining power between the parties); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (declining to enforce a standard form contract that purported to disclaim all implied warranties, also citing gross inequality in bargaining power between the parties). Nearly every testifying class member said that the DCFS investigator simply presented a proposed safety plan with little or no discussion of the plan terms or alternatives. Pet. App. 41.

Just as these factors undermine the notion that a contract was entered into voluntarily, they

undermine the notion that a safety plan was entered into voluntarily.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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